

United States
Circuit Court of Appeals

For the Ninth Circuit.

STOCKTON SAND AND CRUSHED ROCK
COMPANY, INC.,

Appellant,

ve.

JOHN H. BUNDENSEN, HOWARD F. LAU-
RITZEN and BUNDENSEN AND LAURIT-
ZEN, a Co-partnership,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the

United States for the Northern District

of California, Southern Division. MAY 26 1944

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amendment to Libel.....	20
Answer to Libel as Amended.....	23
Assignment of Errors.....	236
Citation on Appeal.....	243
Clerk's Certificate	247
Cost Bond on Appeal.....	239
Counter-Praecipe by Respondents for Apostles on Appeal	245
Decree	233
Deposition of Adrian A. Westall.....	42
—direct	43
—cross	56
—redirect	64
—recross	73
—redirect	74
Exceptions to Libel.....	17
Order Sustaining	20
Final Decree	233
Findings of Fact and Conclusions of Law.....	225
Interrogatories Propounded to Libelant, on Libel as Amended, and Answers by Ed. M. Foy	35

Index	Page
Interrogatories Propounded to Respondents and Each of Them, and Answers by Howard F. Lauritzen	8
Libel for Damages.....	2
Amendment to	20
Libelant's Notice of Appeal and Petition for Allowance Thereof	235
Libelant's Praecipe for Apostles on Appeal.....	241
Minute Order of October 12, 1942—Sustaining Exceptions to Libel.....	20
Minute Order of July 22, 1943—Trial and In- troduction of Respondents' Exhibits.....	41
Minute Order of August 3, 1943—Case Ordered Submitted	77
Minute Order of August 11, 1943—Entering Decree in Favor of Respondents and Dismiss- ing Libel as Amended.....	224
Minute Order of September 7, 1943—Entering Final Decree in Favor of Respondents.....	234
Notice of Appeal by Libelant, and Petition for Allowance Thereof	235
Order Dismissing Amended Libel.....	225
Order Extending Time to Docket to February 4, 1944	246
Order Extending Time to Docket to February 18, 1944	246

Index	Page
Praecipe by Libelant for Apostles on Appeal.....	241
Reporter's Transcript of July 22, 1943.....	78

Libelant's Exhibits:

No. 1—Invoice of Stockton Sand & Crushed Rock Co. to Bundesen & Lauritzen, dated June 30, 1941	178
No. 2—Bundesen & Lauritzen Daily Time Card—May 16, 1941.....	188
No. 3—Bundesen & Lauritzen Daily Time Card—May 19-21, 1941.....	190
No. 5—Statement of Adrian A. West- all taken May 22, 1941.....	210

Libelant's Witness:

Foy, Ed. M.

—direct	83
—cross	87
—redirect	108
—recross	111
—direct (rebuttal)	216

Foy, Ralph Ledingham

—direct	128
—cross	146
—redirect	164
—direct (rebuttal)	218
—cross	222

	Index	Page
Libelant's Witnesses (cont.):		
Foss, Henry		
—direct		118
—cross		121
—redirect		125
Smith, Thomas W.		
—direct		111
—cross		113
—redirect		116
Respondents' Exhibits:		
A—Bill of May 21, sent to Bundesen & Lauritzen		88
B—Letter of May 29, 1941, from Bundesen & Lauritzen to Stockton Sand and Crushed Rock Co.....		89
C—Invoice of Stockton Sand and Crushed Rock Co. dated May 31, 1941, to Bundesen & Lauritzen.....		93
D—Invoice of Stockton Sand and Crushed Rock Co. to Bundesen & Lauritzen dated May 31, 1941.....		94
E—Letter of Stockton Sand and Crushed Rock Co. to Bundesen & Lauritzen dated July 8, 1941.....		96

Index

Page

Respondents' Witnesses:

Kitchen, Robert P.

—direct	196
—cross	205
—redirect	215

Lauritzen, Howard F.

—direct	168
—cross	176

Respondents' Counter-Praecipe for Apostles on Appeal	245
---	-----

Stipulation—Transmitting Original Exhibit to Circuit Court of Appeals.....	244
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NAMES AND ADDRESSES OF PROCTORS

Messrs. DARRAH and ELLIS,
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Stockton, California.

Messrs. SINGLE, BRYANT, COOK and
HERRINGTON,
465 California Street,
San Francisco, California.
Proctors for Libelant and Appellant.

Messrs. DERBY, SHARP, QUINBY and
TWEEDT,
1000 Merchants Exchange Building,
San Francisco, California.
Proctors for Respondents and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California, in Admiralty.

No. 23,686-R

STOCKTON SAND AND CRUSHED ROCK
COMPANY, INC., a corporation,

Libelant,

vs.

JOHN R. BUNDENSEN; HOWARD F. LAU-
RITZEN; BUNDENSEN AND LAURIT-
ZEN; X CORPORATION; JOHN DOE; and
PETER POE,

Respondents.

DERRICK BARGE "FOY 2"
LIBEL FOR DAMAGES

To the Honorable, the Judges of the Southern Divi-
sion of the United States District Court for
the Northern District of California:

The libel of Stockton Sand and Crushed Rock
Company, Inc., a Corporation, libelant, in causes
of action civil and maritime against respondents
above named, respectfully alleges:

I.

Libelant is a corporation duly organized and act-
ing under the laws of the State of California, and
at all times herein mentioned and concerned was

and is the owner of the derrick barge "Foy 2", a commercial vessel of the United States of America.

[1*]

II.

Libelant is informed and believes, and therefore alleges, that respondents John R. Bundensen and Howard F. Lauritzen are doing business under the firm name and style of Bundensen and Lauritzen.

III.

Respondents X Corporation, John Doe and Peter Poe are the fictitious names of respondents whose names are to this libelant unknown, and libelant asks that, when such true names are discovered, this libel may be amended by inserting such true names in the place and stead of such fictitious names.

IV.

On or about May 5, 1941, libelant was in possession of said derrick barge "Foy 2" which then had a reasonable and actual value of \$40,000.00.

V.

On or shortly before May 5, 1941, respondents inspected said "Foy 2" as to engines, derrick, hull and gear, and accepted her in her then condition for their purposes as herein set forth.

VI.

Respondents then and thereupon requested libelant, and libelant thereupon demised and chartered

*Page numbering appearing at foot of page of original certified Transcript of Record.

to respondents; and respondents accepted, chartered and took custody and possession of said "Foy 2" and then and thereafter operated her. Said matters were orally agreed, on or shortly before May 5, 1941.

VII.

Said charter and demise was a "bare-boat charter" whereunder, not the libelant, but solely the respondents employed and controlled and directed the captain, engineer, operators and crew of said "Foy 2" as their, respondents', employees and crew; and respondents contracted and agreed with libelant to return said [2] "Foy 2" to libelant at the end of said charter and temporary possession of respondents, in her then or equal order and condition, reasonable wear and tear only excepted.

VIII.

Respondents advised libelant that they contemplated use of said "Foy 2" in or near Solano County, California, for a completion of a certain job then contemplated by respondents, and agreed to deliver her back to libelant on the completion of said job. Said job is completed. The reasonable time of duration of said charter and demise and job has terminated.

IX.

Libelant has heretofore demanded return of said "Foy 2" as above agreed, or that failing, payment of her said value, but respondents and each of them have failed and refused either to return said "Foy

2'' or to pay her value, excepting only that respondents did return to libelant certain relict and damaged portions of said "Foy 2" of a value of \$500.00, all to libelant's damage in the sum of \$39,500.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And for a Further, Separate and Second Cause of Libel, Libelant Alleges:

XI.

Libelant incorporates herein all of the paragraphs of its first cause of libel herein, and refers to the same as though more fully set forth herein.

XII.

Libelant is informed and believes and thereupon alleges that respondents and each of them so carelessly and negligently used, [3] cared for, and mishandled said barge "Foy 2", and so failed to take proper care of said barge "Foy 2" that therein and thereby said "Foy 2" has been badly damaged by fire; that the reasonable cost of repairing said "Foy 2" is the sum of \$39,500.00, all to libelant's damage in the sum of \$39,500.00.

XIII.

Libelant is informed and believes, and thereupon alleges, that respondents were negligent in the afore-

said matters and things in the following particulars (among others which will be shown at the trial of this cause, and in which particulars libelant hereby prays that this libel may be amended and supplemented):

(a) Starting a fire in the firebox without properly inspecting the condition thereof and also without leaving an attendant to watch said fire, but on the contrary in deliberately leaving said fire entirely unattended after starting the same.

(b) Thereafter, hearing a noise of a suspicious nature in the manner of the puff of a small explosion or fire, in not ascertaining the cause of said noise or fire, or sending any attendant to said noise immediately.

(c) In later taking improper measures to arrest and prevent the spread of said fire and particularly, entirely neglecting to use any fire extinguisher for said purpose.

(d) In not sufficiently manning said "Foy 2" with careful, prudent and capable men and crew.

(e) In ordering or permitting the fire to be thus generated in said "Foy 2" with only one employee aboard, and particularly when that one employee did not remain in constant attendance at the fire during such periods as lighting the fire.

(f) In failing to properly care for said "Foy 2" and particularly to guard her against fire. [4]

Wherefore, libelant prays that process and citation in personam in due form of law and according to the practice of this Honorable Court in cases of

admiralty and maritime jurisdiction or admiralty foreign attachments may issue against the respondents above named and each of them to answer the libel herein and to answer all and singular the interrogatories attached to the libel, and that this Court decree the payment by respondents and each of them to libelant of the aforesaid damages, together with interest thereon and costs of suit herein, and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

DARRAH & ELLIS
SINGLE, BRYANT, COOK
& HERRINGTON
Proctors for Libelant

State of California,
County of Santa Cruz—ss.

Ed M. Foy, being first duly sworn, deposes and says:

I am an officer, to-wit, the Secretary-Treasurer of Stockton Sand and Crushed Rock Company, Inc., libelant herein; I have read the libel and it is true, except as to those portions alleged upon information and belief, and as to those portions, I believe it to be true.

ED. M. FOY
Sec.-Treas.

Subscribed and sworn to before me this 9th day of July, 1942.

[Seal]

JENNIE L. JONES

Notary Public in and for the County of Santa Cruz,
State of California.

My Commission Expires May 6, 1946.

[Endorsed]: Filed Jul 10 1942. Walter B. Mal-
ing, Clerk. [5]

INTERROGATORIES PROPOUNDED TO RE-
SPONDENTS AND EACH OF THEM AND
ANSWERED BY HOWARD F. LAURITZEN

Interrogatory No. 1.

Did not respondents inspect the "Foy 2" before taking her?

Answer.

No. Respondents saw the "Foy 2" but did not inspect her condition.

Interrogatory No. 2.

Did not respondents accept the "Foy 2" in her then condition after their inspection?

Answer.

No. Respondents relied, in contracting for the service of the "Foy 2", upon libellant's warranty of her seaworthiness and fitness for the intended service.

Interrogatory No. 3.

Did not respondents then take possession and control of the "Foy 2"?

Answer.

No.

Interrogatory No. 4.

Did not a fire occur on the "Foy 2"?

Interrogatory No. 5.

When and where did the fire occur?

Answer (to Interrogatories 4 and 5).

A fire occurred on the "Foy 2" shortly after 4 A. M. on May 21, 1941, a short distance northerly of Vallejo, California.

Interrogatory No. 6.

At that time who employed the crew of the "Foy 2"?

Answer.

Respondents secured the crew of the "Foy 2" at the request of and for the account of libelant who had agreed to furnish and pay a crew. [6]

Interrogatory No. 7.

At that time who controlled and directed her crew?

Answer.

The interrogatory is indefinite and calls for a conclusion. At the time the fire commenced, there was one man aboard the barge, the fireman. In general, respondents specified the work to be done by

the barge. Libelant presumably, pursuant to the agreement for the service of the barge, controlled and directed the crew as to the operation of the barge.

Interrogatory No. 8.

a. What men were on board the "Foy 2" at the time of the fire?

b. Who employed,

c. paid and

d. controlled them?

Answer.

a. A. A. Westall, fireman, at the time the fire commenced.

b. Answered in answer to Interrogatory 7 above.

c. Respondents advanced wages to A. A. Westall in the first instance for the three days' work previous to the date of the fire and were reimbursed for such advance by libelant.

d. Answered in answer to Interrogatory 7 above.

Interrogatory No. 9.

At the time of the fire who was in charge of the "Foy 2" and who hired and controlled him?

Answer.

Answered in answers to Interrogatories 7 and 8 above.

Interrogatory No. 10.

How many men are necessary

a. To safely operate the "Foy 2" during her work?

b. To safely man the "Foy 2" while her fires are lighted? [7]

Answer.

a. Presumably two, since libelant agreed to furnish a crew consisting of an engineer and a fireman.

b. Presumably one, since libelant furnished one fireman.

Interrogatory No. 11.

State what means of fire fighting, such as pumps, buckets filled with water, hoses, extinguishers, were available on the "Foy 2" and their location.

Answer.

Respondents have no inventory of such means of fire fighting. However, all fire fighting equipment which was on the barge at the time libelant brought the barge to the place of the intended work or placed thereon by libelant thereafter, was still on the barge at the time of the fire.

Interrogatory No. 12.

State which, if any, of those fire fighting means were used when the "Foy 2" caught on fire, and the manner of use, and who performed the fighting.

Answer.

Respondents answer on information and belief that fireman Westall attempted to smother out the fire with sacking and pieces of clothing when he first observed it. Respondents understand that thereafter fireman Westall was assisted by engineer Williams, R. P. Kitchen and certain members of the Vallejo

fire department who succeeded in extinguishing the fire.

Interrogatory No. 13.

What was the origin of the fire which damaged the "Foy 2"?

Answer.

The exact origin of the fire is unknown to respondents. Respondents state on information and belief that fireman Westall started a fire in the fire box of the boiler in the usual way in which he had been instructed by libellant; the burner [8] appeared to operate all right; shortly thereafter, there was a light explosion and oil and flame reached the floor or deck around the boiler.

Interrogatory No. 14.

State the manner in which the fires were lighted in the "Foy 2's" fire box on the occasion when she burned, and who did the lighting.

Answer

Respondents answer on information and belief that fireman A. A. Westall lighted the fire in the fire box by placing and lighting a burning rag in the fire box to ignite the fuel oil.

Interrogatory No. 15.

How many men were on the "Foy 2" when the fire was lighted in her fire box on the occasion of her burning?

Answer.

One.

Interrogatory No. 16.

When was the discovery made that the "Foy 2" was on fire, and who made the discovery?

Answer.

Respondents answer on information and belief that A. A. Westall saw the fire around the boiler about 4 A. M.

Interrogatory No. 17.

At the time the "Foy 2" was discovered to be afire, what was the then location and extent of the fire?

Answer.

Respondents answer on information and belief that the fire was first observed on the deck or floor near the boiler.

Interrogatory No. 18.

When a fire is to be started in the "Foy 2's" fire box [9]

a. Should not more than one person be aboard to act if an emergency by fire occurs?

b. Should not one man remain in constant attendance at the fire box to observe and control the fire within the fire box and to safeguard against portions of the ship catching fire?

Answer.

Respondents cannot answer this conjectural and argumentative question with respect to the operation of libelant's barge.

Interrogatory No. 19.

What inspection of the fire box on the "Foy 2", or preparation thereof, was made before the fires were lighted on this occasion, and who performed the inspection or preparation?

Answer.

Respondents answer on information and belief that A. A. Westall examined the fire box, observed the air pressure, the fuel flow, and after lighting the fire observed that it was apparently burning properly.

Interrogatory No. 20.

Prior to the time that the "Foy 2" was discovered by someone to be afire, what was that person doing and where was he?

Answer.

Respondents answer on information and belief that Westall was standing on the deck of the barge a short distance from the fire box.

Interrogatory No. 21.

How long after the fires were started in the "Foy 2's" fire box was it before the dredge herself was discovered to be on fire?

Answer.

Respondents answer on information and belief that it was about five minutes from the time the fire was started in the [10] fire box until fire was observed in the floor or deck around the boiler.

Interrogatory No. 22.

After someone had lighted the fires in the "Foy 2's" fire box on this occasion, what further care or attention was given to the fire box, and by whom was it given?

Answer.

Respondents answer on information and belief that fireman Westall observed the satisfactory operation of the burner for two or three minutes after the fire was started in the fire box, before turning away from the fire box.

Interrogatory No. 23.

On how many previous occasions had the person who fired the "Foy 2" on this occasion, fired her?

Answer.

Respondents do not know.

Interrogatory No. 24.

In answer to the above interrogatories various persons will have been indicated, either by name or position in each case, as of the date in question, state:

- a. Who had hired that person?
- b. Who had paid that person up to that date?
- c. Who controlled that person and gave him his orders on that date?

Answer.

Answered in answer to Interrogatories 6, 7 and 8 above.

Interrogatory No. 25.

Please list all men employed on the "Foy 2" on this occasion, stating the position each filled and his experience in that capacity. [11]

Answer.

A. A. Westall, fireman, 15 years' experience.

..... Williams, engineer, 15 years' experience.

Interrogatory No. 26.

State whether the respondents Bundensen and Lauritzen comprise a corporation or a partnership, and if the latter, state the names and addresses of the members of the partnership.

Answer.

Partnership.

James R. Bundesen, Central Avenue, Pittsburg, California.

Howard F. Lauritzen, 214 Ninth Street, Antioch, California.

Interrogatory No. 27.

Did any other person, corporation, or other entity have control over the men employed on the "Foy 2" on the day of the fire, and if so, state names, addresses and extent of control?

Answer.

The interrogatory is ambiguous, but as stated above, the crew of the "Foy 2" were under the sole control of libelant with respect to the operation of the barge, so far as known to respondents.

Interrogatory No. 28.

If Bundensen and Lauritzen is a partnership, is it a general or limited partnership? If a limited partnership, state name and address of general partner.

Answer.

General partnership.

(Verification)

(Receipt of service)

[Endorsed]: Filed Sep. 21, 1942. [12]

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

The exceptions of James R. Bundesen, Howard F. Lauritzen, and Bundesen & Lauritzen, to the libel herein respectfully allege:

I.

Said libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them.

II.

The first alleged cause of libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them. [13]

III.

The second alleged cause of libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them.

IV.

Said libel does not allege facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

V.

The first alleged cause of libel does not state facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VI.

The second alleged cause of libel does not allege facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

Except to the sufficiency, fullness, distinctness and competency of Article VI of said libel, and to said Article VI as incorporated in the second alleged cause of action, in that the same are merely allegations of conclusions and not of fact, and said Article VI should be stricken.

VIII.

Except to the sufficiency, fullness, distinctness and competency of Article VII of said libel, and to said Article VII as incorporated in the second alleged cause of action, in that the same are merely allegations of conclusions and not of fact, and said Article VII should be stricken.

IX.

Except to the relevancy and competency of the allegation [14] contained in Article XII of the second alleged cause of action relative to the cost of repairing said "Foy 2" and libelant's alleged damage in the sum of \$39,500.00, in that said allegations do not constitute the proper legal basis of libelant's alleged damage.

X.

Except to the sufficiency, fullness and distinctness of said libel, and of each alleged cause of action therein, in that said libel fails to set forth the terms and provisions of said alleged charter.

Wherefore, said Respondents pray that the foregoing exceptions be sustained and that said libel be dismissed with costs to respondents.

September 21, 1942.

DERBY, SHARP, QUINBY
& TWEEDT

Proctors for Respondents

James R. Bundesen, Howard F.
Lauritzen, and Bundesen &
Lauritzen

(Receipt of Service)

[Endorsed]: Filed Sep. 21, 1942. [15]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof,

in the City and County of San Francisco, on Monday, the 12th day of October, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER SUSTAINING EXCEPTIONS
TO LIBEL; ETC.

This cause came on regularly this day for hearing on Exceptions to Libel, whereupon after hearing the arguments of Mr. Shingle for Libelant and Mr. Tweedt for Respondent, it is ordered that the Exceptions to the Libel be and the same are hereby sustained, with ten (10) days within which to amend. [16]

[Title of District Court and Cause.]

DERRICK BARGE FOY No. 2
AMENDMENT TO LIBEL

On hearing of Respondents' exceptions to libel, the Court having ordered Libelant to more particularly allege the oral chartering herein concerned, now, in compliance therewith, Libelant respectfully amends its Libel and Article VI thereof to read as follows:

VI. Respondents then and thereupon requested Libelant, and Libelant thereupon demised and chartered to Respondents; and Respondents accepted, chartered and took custody and possession of said

“Foy No. 2” and then and thereafter operated her. Said matters were orally agreed, on or shortly before May 15, 1941, at which time Respondent Lauritzen, for said Respondents, telephoned the office of Libelant in the San Pablo Hotel, Oakland, California, [17] speaking to Captain Ed Foy, asking how much would be charged by Libelant, who advised he had no crew to supply, to which Lauritzen said that he would furnish the crew, and Foy offered to supply the derrick barge at \$80 per day of eight hours employment, including fuel oil, Lauritzen to use his own engineer and fireman and pay them, but such amounts to be deducted from rental of derrick. Lauritzen also stated he had seen the derrick barge and knew what it was. Lauritzen asked if Libelant had insurance on the Foy No. 2, to which Foy answered it did. Lauritzen requested Libelant to deliver the Foy No. 2 to Respondents above Sears Point bridge in the navigable waters of Solano County at Respondents’ expense of delivering for towing to Respondents’ job, and Respondents to return it to Libelant or to pay for return towing on Respondents’ completion of the job; as Respondents wanted it for two or three weeks. At said time Libelant did not know the engineer or fireman to be employed or thereupon or thereafter employed by Respondents, and Libelant so delivered said derrick barge to Respondents.

DARRAH & ELLIS

SINGLE, BRYANT, COOK

& HERRINGTON

Proctors for Libelant

State of California,
County of—ss.

Ed M. Foy, being first duly sworn, deposes and says:

I am an officer, to wit, Secretary-Treasurer of Stockton Sand and Crushed Rock Company., Inc., Libelant herein. I have read the amendment to Libel and it is true.

ED M. FOY

Subscribed and sworn to before me this 13th day of October, 1942.

VERA C. WILKINS

Notary Public in and for the County of Alameda,
State of California.

My Commission Expires May 23, 1944.

[Seal]

Receipt of a copy of the within Amendment to Libel is hereby admitted this 14th day of October, 1942.

DERBY, SHARP, QUINBY
& TWEEDT

Proctor for Respondents

[Endorsed]: Filed Oct. 16, 1942. [18]

[Title of District Court and Cause.]

ANSWER TO LIBEL AS AMENDED

To the Honorable, the Judges of the United States
District Court for the Northern District of
California, Southern Division:

The answer of respondents, James R. Bundesen
(sued as John R. Bundensen), Howard F. Lauritzen
and Bundesen and Lauritzen (sued as Bundensen
and Lauritzen), to the libel herein, as amended, ad-
mits, denies and alleges as follows:

I.

Said respondents are not informed concerning
the matters alleged in Article I of said amended
libel, wherefore they deny the same and call for
strict proof thereof if and so far as material. [19]

II.

Answering unto the allegations of Article II of
said amended libel, said respondents allege that
James R. Bundesen and Howard F. Lauritzen are
copartners doing business under the firm name and
style of Bundesen & Lauritzen.

III.

Said respondents are not informed concerning the
matters alleged in Article III of said amended libel,
wherefore they call for strict proof thereof if and
so far as material.

IV.

Answering unto the allegations of Article IV of said amended libel, said respondents admit that on or about May 5, 1941, libelant was in possession of the derrick barge known as "Foy 2"; deny that said derrick barge then or at any time thereafter, or at all had a reasonable and actual, or reasonable or actual, value of \$40,000.00, or any other sum at all except as hereinafter alleged. Respondents are informed and believe, and therefore allege that said derrick barge had a value of approximately Five Thousand (\$5,000.00) Dollars at all times referred to in said amended libel.

V.

Answering unto the allegation of Article V of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained.

VI.

Answering unto the allegations of Article VI of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained, except as hereinafter alleged and admitted. In this respect, said respondents allege that on or about the 13th day of May, 1941, libelant and respondent Bundesen & Lauritzen made an oral agreement for the services of the derrick [20] barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick

barge "Foy No. 2" in connection with a construction job being performed by said respondents near Vallejo, California. Libelant agreed to furnish such services until the completion of the said construction job provided said respondents found that the said barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of \$10.00 per hour of actual use for eight hours per day or less with a minimum charge for four hours on any day the barge was steamed up, and to furnish and pay for an engineer or operator of the barge, a fireman, water, fuel, oil and full hull insurance. Libelant agreed to keep said barge fully insured for the benefit of the parties. Libelant warranted that the barge was in good condition and ready to perform the contemplated services. Respondent Bundesen & Lauritzen, on their part, agreed to pay said hourly charge for said services for each hour of actual services with the minimum charge as aforesaid. Respondent Bundesen & Lauritzen further agreed to pay the cost incurred by libelant in towing said barge from Oakland to the place of the said construction work and in towing her back to Oakland upon the completion of the services.

VII.

Answering unto the allegations of Article VII of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained. Said respondents allege that respondent

Bundesen & Lauritzen contracted with libelant for the services of the derrick barge "Foy 2" on the terms set forth in paragraph VI hereinabove. [21]

VIII.

Answering unto the allegations of Article VIII of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained, except that respondent Bundesen & Lauritzen admit that they advised libelant that the services of the "Foy 2" were desired on a construction job near Vallejo in Solano County and that said job has been completed.

IX.

Answering unto the allegations of Article IX of said amended libel, respondents deny each and every, all and singular, the allegations therein contained, except respondents admit they have not paid the alleged value of said "Foy 2". Respondents allege that said "Foy 2" was at all times referred to in said amended libel in the possession and under the control of libelant.

X.

Answering unto the allegations of Article X of said amended libel, said respondents deny that all and singular, or all or singular, the premises are true, except as herein expressly admitted, but admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And further answering unto said amended libel and unto the Second alleged cause of libel therein, said respondents admit, deny and allege as follows:

XI.

Answering unto the allegations of Article XI of said second alleged cause of libel wherein libelant incorporates all of the paragraphs of its first alleged cause of libel, said respondents hereby refer to their answers thereto set forth above herein in Article I to X inclusive, and by such reference expressly incor- [22] porate said answers herein as though fully set forth in full hereat.

XII.

Answering unto the allegation of Article XII of said Second alleged cause of libel, said respondents deny each and every, all and singular the allegations therein contained. In this respect, said respondents allege that said "Foy 2" was damaged by fire while in the possession, control and custody of libelant at the location of said construction job of respondent Bundesen & Lauritzen.

XIII.

Answering unto the allegations of Article XIII of said Second alleged cause of libel, said respondents deny each and every, all and singular, the allegations therein contained.

And further answering unto said Amended Libel and unto each alleged cause of action therein, and by way of a First, Separate and Affirmative Defense thereto, respondents allege as follows:

I.

On or about the 13th day of May, 1941, libelant and respondent Bundesen & Lauritzen made an oral agreement for the services of the derrick barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick barge "Foy No. 2" in connection with a construction job being performed by said respondents near Vallejo, California. Libelant agreed to furnish said services until the completion of the said construction job provided said respondents found that the said barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of \$10.00 per hour of actual use for eight hours per day or less with [23] a minimum charge for four hours on any day the barge was steamed up, and to furnish and pay for an engineer or operator of the barge, a fireman, water, fuel, oil, and full hull insurance. Libelant agreed to keep said barge fully insured for the benefit of the parties. Libelant warranted that the barge was in good condition and ready to perform the contemplated services. Respondent Bundesen & Lauritzen, on their part, agreed to pay said hourly charge for said serv-

ices for each hour of actual services with the minimum charge as aforesaid. Respondent Bundesen & Lauritzen further agreed to pay the cost incurred by libelant in towing said barge from Oakland to the place of the said construction work and in towing her back to Oakland upon the completion of the services.

II.

That under and pursuant to said agreement for the services of said barge, the operation, possession, maintenance, care and control of said barge was and remained in the hands of libelant; that if and insofar as any damage was due to or caused by any fault or neglect on the part of any member of the crew of said barge, libelant, not respondents, was and is responsible for any and all such alleged fault or neglect.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Second, Separate and Affirmative Defense thereto, said respondents alleged:

I.

Said respondents refer to the allegations set forth in paragraph I of the First Affirmative Defense herein, and hereby expressly incorporate said allegations as part of this Second Affirmative Defense as if here set forth in full. [24]

II.

That under and pursuant to said agreement, libelant agreed to furnish and pay for full hull insurance on said barge and to keep said barge fully insured for the benefit of libelant and said respondents. Respondents are informed and believe and therefore alledge that libelant did fully insure said barge and that said insurance against loss or damage by fire, among other perils, was in full force and effect on May 21, 1941, at the time said barge was damaged by fire.

III.

Respondents are informed and believe that libelant made claim under said insurance for any and all damage suffered by said barge, as the result of said fire and that, pursuant to such claim, libelant has received payment from the insurer for any and all loss or damage suffered by said barge during the times referred to in the amended libel herein.

IV.

That under and pursuant to said agreement between libelant and respondent Bundesen & Lauritzen, said respondents are entitled to the benefit of said payment received by libelant from the insurer of said barge and are by reason thereof relieved of any and all liability, if any there be, for loss or damage to said barge.

V.

That if and insofar as libelant has not been compensated by the insurer of said barge for damage

suffered by said barge by reason of fire, as aforesaid, such failure to secure full compensation from the insurer is due to libelant's failure to keep said barge fully insured in breach of its agreement as aforesaid with said respondents; that by reason of such breach of its agreement, [25] libelant is estopped to claim or recover any damages suffered by said barge as the result of said fire on May 21, 1941.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Third, Separate and Affirmative Defense Thereto, said respondents allege:

I.

Said respondents refer to the allegations set forth in Paragraph I of the First Affirmative Defense herein, and hereby expressly incorporate said allegations as part of this Third Affirmative defense as if here set forth in full.

II.

That under and pursuant to said agreement libelant warranted that said barge was seaworthy in all respects and fit for the intended service.

III.

That in breach of said warranty of seaworthiness in all respects said barge was in fact unseaworthy in hull and equipment. Respondents are informed and believe and therefore allege that the fire which occurred on said barge on May 21, 1941, was due to

and caused by the unseaworthiness of the equipment of said barge.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Fourth, Separate and Affirmative Defense thereto, said respondents alleged:

That the fire which damaged the "Foy No. 2" occurred on the 21st day of May, 1941; that the libel herein was filed on the 10th [26] day of July, 1942; that libelant's delay in bringing its alleged cause of action for damage to said barge by reason of said fire has deprived these respondents of material evidence; that libelant has been guilty of laches and unreasonable delay in bringing the above entitled action.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Fifth, Separate and Affirmative Defense thereto, said respondents allege:

I.

Said respondents refer to the allegations set forth in paragraph I of the First Affirmative Defense herein and hereby expressly incorporate said allegations as part of this Fifth Affirmative Defense as if here set forth in full.

II.

That under and pursuant to said contract, libelant furnished to respondent Bundesen & Lauritzen the services of said barge on the 16th, 19th, and

20th days of May, 1941; that on the 21st day of May, 1941, said barge was damaged by fire and thereafter rendered no further service to said respondents.

III.

That subsequent to the 21st day of May, 1941, to-wit, on or about the 9th day of July, 1941, libelant rendered a bill to respondents for any and all items due from said respondents to libelant pursuant to said contract, and thereafter, to-wit, on or about the 11th day of July, 1941, libelant received and accepted from said respondents the sum of \$238.88 in payment of said items; that in accepting said payment, libelant made no reservation of any [27] right or claim to make or present any additional claim or item against respondents for damage to said barge by fire or other cause; that by rendering said bill and accepting payment thereof, libelant has waived and released any claim or cause of action for damage to said barge by fire or other cause.

Wherefore, said respondents pray that the libel herein, as amended, may be dismissed with costs to respondents, and for such other and further relief as to this Honorable Court may seem just and proper in the premises.

DERBY, SHARP, QUINBY
& TWEEDT

Proctors for Respondents
James R. Bundesen, Howard F.
Lauritzen and Bundesen &
Lauritzen [28]

State of California,
City and County of San Francisco—ss.

Howard F. Lauritzen, being first duly sworn, deposes and says:

That he is one of the respondents in the above entitled action and makes this verification on behalf of respondents James R. Bundesen, Howard F. Lauritzen, and Bundesen & Lauritzen; that he has read the foregoing Answer to Libel, as amended, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HOWARD F. LAURITZEN

Subscribed and sworn to before me this 3rd day of November, 1942.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 3, 1942. Walter B. Maling, Clerk. [29]

INTERROGATORIES PROPOUNDED TO
LIBELANT AND REQUIRED TO BE AN-
SWERED UNDER OATH, AND LIBEL-
ANT'S ANSWERS TO INTERROGATO-
RIES PROPOUNDED BY RESPONDENTS,
ANSWERED BY ED M. FOY, SECRE-
TARY-TREASURER OF THE STOCKTON
SAND AND CRUSHED ROCK COMPANY,
INC., A CORPORATION, LIBELANT

Interrogatory No. 1.

It is true, is it not, that the parties agreed that the charge for the services of the "Foy No. 2" to respondents was to be \$10.00 per hour of actual use, with a minimum charge for four hours on any day the boiler was steamed up?

Answer.

No. Rental of \$10.00 per hour for actual use of the Foy No. 2, with minimum of four hours on any day boiler is steamed up.

Interrogatory No. 2.

It is true, is it not, that the parties agreed that the charge of \$10.00 per hour was to include an engineer or operator, a fireman, water, fuel, oil and hull insurance on the barge?

Answer.

No.

Interrogatory No. 3.

It is true, is it not, that libelant brought the "Foy No. 2" to the location of respondent's construction job on May 15, 1941?

Answer.

Yes. Our tug delivered the derrick barge to respondents, who agreed to pay, and did pay, for this towage.

Interrogatory No. 4.

On May 15, 1941, the crew of the "Foy No. 2" consisted of an engineer and a fireman in the employ of libelant, did it not? [30]

a. What is the name of said engineer?

b. What is the name of said fireman?

Answer.

No. Libelant had no crew on the Foy No. 2 at the time of the agreement, nor at the time of the fire.

Interrogatory No. 5.

Did libelant inform respondents on or about May 14, 1941, that libelant had to put the said engineer and fireman of the "Foy No. 2" on another job?

a. Did libelant thereupon request respondents to endeavor to secure another engineer and fireman for and on behalf of libelant?

Answer.

No. Libelant said it had no crew aboard and had not had any crew aboard her for some time before. Respondents stated they would furnish crew and did so.

a. No.

Interrogatory No. 6.

It is a fact, is it not, that pursuant to libelant's request respondents secured Engineer Williams and Fireman Westall for libelant?

Answer.

No.

Interrogatory No. 7.

It is a fact, is it not, that on May 16, 1941, libelant's regular engineer and fireman instructed Engineer Williams and Fireman Westall in the manner of operating the barge and its equipment?

Answer.

No; Ralph Foy, vice president of libelant, showed one of respondents' employees, it is believed the fireman Westall, how to start the fire. [31]

Interrogatory No. 8.

The hourly charge to respondents for the service of the "Foy No. 2" included the wages of Engineer Williams and Fireman Westall, did it not?

Answer.

No. As already stated, the agreement was for payment of \$10.00 per hour for the barge and use of the fuel already aboard, and respondents expressly agreed to furnish the crew and charge their wages back by deducting from rental.

Interrogatory No. 9.

It is a fact, is it not, that libelant agreed to keep the "Foy No. 2" fully insured during the period of service to respondents?

Answer.

No.

Interrogatory No. 10.

It was agreed, was it not, that the cost of such insurance for the benefit of the parties was to be included in the hourly charge of \$10.00 for the service of "Foy No. 2"?

Answer.

No.

Interrogatory No. 11.

Was the "Foy No. 2" fully insured at the time she was damaged by fire on May 21, 1941?

Answer.

As to usual risks, the Foy No. 2 was fully insured, viz., marine, fire, collision, stranding, etc. only to an agreed insured value of \$12,000.00, being part of libelant's master policies of insurance in the total sum of \$27,000.00 on the Foy No. 2 and two other of libelant's vessels. \$12,000.00 was not full insurance of the value of the Foy No. 2. [32]

Interrogatory No. 12.

Please state with respect to the hull insurance in effect on the "Foy No. 2" at the time of the fire on May 21, 1941:

- a. The name of the insurer?
- b. The amount of insurance?
- c. The value of the "Foy No. 2" declared in the policy?

Answer.

a and b. Home Insurance Company of New York insured \$6,000.00; Providence Washington Insur-

ance Company insured \$3,000.00; Atlas Assurance Company, Ltd. insured \$3,000.00.

c. \$12,000.00.

Interrogatory No. 13.

Did libelant receive any payment or loan from the hull insurer of the "Foy No. 2" by reason of the damage to the said barge as a result of the fire on May 21, 1941?

Answer.

Yes.

Interrogatory No. 14.

If interrogatory No. 13 is answered in the affirmative, please state:

a. The amount claimed by libelant from the hull insurer?

b. The amount received by libelant from the hull insurer?

Answer.

a. Full amounts insured on Foy No. 2 under each of the above three master policies.

b. Full amounts insured, excepting for \$500.00 being the agreed value of the salvage, which libelant received from insurers by proportionate reductions.

Interrogatory No. 15.

Is this action being prosecuted for the benefit, in whole or in part, of the said hull insurer of the "Foy No. 2"? [33]

Answer.

Yes. To the extent of their payments, as above.

Interrogatory No. 16.

Please state with respect to the damage by fire to the "Foy No. 2" on May 21, 1941:

- a. What part or parts of the hull were damaged?
- b. What part or parts of the house and superstructure were damaged?
- c. What equipment was damaged?

Answer.

- a. Deck and supporting members burned through.
- b. Operator's house completely destroyed. All superstructure over machinery, including mast and boom, destroyed.
- c. Equipment damaged included boiler, engine, hoist, drums, swinging engine, gear, ropes, cable, tools, A frame, tanks, etc.

Interrogatory No. 17.

It is a fact, is it not, that after May 21, 1941, libelant billed respondents for the amount due to litigant from respondents pursuant to said contract?

Answer.

No. Libelant billed respondents for the use of the derrick Foy No. 2 and towing, expressly stating "this statement does not release your Company from further liability or settlement in connection with loss due to the fire".

Interrogatory No. 18.

It is true, is it not, that after May 21, 1941, libelant accepted payment of the amount due from respondents to libelant pursuant to said contract without reserving the right to claim any further sum to

be due as damages to the "Foy No. 2" by reason of the fire on May 21, 1941?

Answer.

No. [34]

(Verification of Ed. M. Foy, Secretary-Treasurer of the Stockton Sand and Crushed Rock Co., Inc.)

(Receipt of Service)

[Endorsed].: Filed Nov. 21, 1942. [35]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 22nd day of July, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial. Guard Darrah and Agler Ellis, Esqrs., were present on behalf of the Libelant. Lloyd Tweedt, Esq., was present on behalf of the Respondent. Mr. Darrah and Mr. Tweedt made opening statement to the Court. Ed. M. Foy, Thomas W. Smith, Henry Fosa

and Ralph Foy were each sworn and testified on behalf of the Libelant. Mr. Tweedt introduced in evidence and filed Respondent's Exhibits A, B, C and E. Mr. Tweedt also offered a certain exhibit which was marked Respondent's Exhibit D for identification. It is ordered that the further trial of this case be continued to July 23, 1943, at 10 A. M. [36]

[Title of District Court and Cause.]

DEPOSITION OF ADRIAN A. WESTALL,
taken on behalf of the Libelant, before M. A. Clark,
Notary Public in and for the County of Los Angeles,
State of California, on Saturday, the 12th day of June,
1943, beginning at 2:30 o'clock p. m., at 614 Pacific Avenue,
San Pedro, California, pursuant to Stipulation hereto attached.

Appearances:

For the Libelant: Darrah & Ellis, by Guard
Darrah, Esq., 311 E. Main Street, Stockton,
California.

For the Respondents: Derby, Sharp, Quinby
& Tweedt, by Lloyd M. Tweedt, Esq., 1000
Merchants Exchange, San Francisco, California. [37]

ADRIAN A. WESTALL,

being by me first duly sworn to testify the truth, the whole truth and nothing but the truth relative to the action named in the caption hereof, deposed and made answers as follows:

Direct Examination

By Mr. Darrah:

Q. Your name is Adrian Westall?

A. Correct.

Q. And you were the fireman on the Foy Derrick Barge Number 2, in May, 1941, when it burned?

A. Yes, sir.

Q. Who did you work for at that time *time*?

A. I worked for Bundensen and Lauritzen at that time.

Q. How long before the burning of the Foy Number 2 was it that you were first employed by Bundensen and Lauritzen?

A. It was around two weeks.

Q. Do you remember the date of the burning of the Foy Number 2?

A. It was May 14, 1941.

Q. May 14th, or was it May 21st?

A. May 21st is right. I made a note of that, and let me look to see, to be sure. May 16th.

Q. May 16th is when you went to work for Bundensen and Lauritzen? [38]

A. No, when I first went to work for Bundensen and Lauritzen was May 21st. No, wait a minute, I am mixed up.

(Deposition of Adrian A. Westall.)

Q. Well, there is no issue about the date of the burning of the barge anyway, as far as that goes.

A. I worked for them a couple of weeks there before. I don't seem to have the date here.

Mr. Darrah: You will agree as to the record of the burning, the date was May 21, 1941?

Mr. Tweedt: Yes.

The Witness: I have that record as to the burning of the barge, it was May 21, 1941.

Q. By Mr. Darrah: Now, who gave you your directions as to what to do when you came to work there?

A. Well, one of the employees of the Foy Barge gave me my directions and what to do. They instructed me how.

Q. I mean generally, who gave you your duties, who was your boss on the job?

A. I was working for Bundensen and Lauritzen. They were my bosses.

Q. Did they have a superintendent or anyone there who directed the work?

A. No, Bundensen and Lauritzen did not. I got my instructions from one of the Foy's workman.

Q. As to what?

A. As to how to fire the boiler. [39]

Q. Wasn't that Ralph Foy and his brother-in-law that showed you how to fire the boiler?

A. I believe one of them was Ralph Foy. I am not sure of that, but I am pretty sure he said his

(Deposition of Adrian A. Westall.)

name was Foy; the engineer, he was the one that was giving instructions.

Q. You just saw him on the one occasion?

A. Yes, sir.

Q. He only instructed you as to the firing of the boiler? A. Yes, sir, that's correct.

Q. I mean generally, as to the work you did, who gave you your instructions?

A. Well, my instructions were given to me by Foy and the man under him.

Q. Well, they did not stay on the job and tell you what to do, did they?

A. They told me how to take care of the boiler.

Q. Who told you how to operate the equipment? What was the equipment doing? The derrick barge?

A. I wasn't operating the equipment; I was just firing it.

Q. Who gave you instructions as to when to come and fire it, and when to quit? Instructions like that? A. Bundensen and Lauritzen.

Q. An individual? Some individual, was that?

A. Some individual? The man that they had in charge of [40] the job there, I forget what his name was. I still don't remember what his name was.

Q. Now, who paid you?

A. Bundensen and Lauritzen.

Q. Do you know whether you were carried under their Workman's Compensation Insurance?

A. No, I don't.

(Deposition of Adrian A. Westall.)

Q. Did they deduct for your Social Security, or whatever it was that is required to be deducted?

A. Yes, they deducted that.

Q. How long had you been on the barge, this derrick barge, when Ralph Foy and his brother-in-law showed you and told you how to fire it?

A. How long had I been on it?

Q. Yes.

A. The first thing I got on in the morning, I had probably been on there a few minutes before they started to give me instructions as to how to fire it.

Q. And as soon as they had given you those instructions they went away?

A. Yes, in probably fifteen minutes.

Q. And you understood that was all the instructions you were to get from them?

A. Yes.

Q. They were not constantly instructing you?

A. No, sir. [41]

Q. Then you ran it a few days, did you, before anything happened?

A. No, this particular barge, no.

Q. Do you remember how many days you had been operating it?

A. The barge that burnt I had not run it at all. They gave me my instructions about fifteen minutes in the morning, and I went to work on it that day. I worked on it then that day; fired the boiler; previous to the day that it was burnt up.

Q. You had fired it that previous day?

(Deposition of Adrian A. Westall.)

A. Yes.

Q. And had it worked that day?

A. Yes, sir, it worked perfectly.

Q. Now, tell us what happened on the 21st of May, 1941?

A. Well, on the 21st day of May, 1941, I went up to fire the boiler, and had gotten up a reasonable amount of speed; I had got the firing well under way, and was subjected to a call to the toilet, and I left for four or five minutes, and when I come back it was, well, I would call it, it must have been combustion fire that started the fire that burnt up the boiler.

Q. Well, now, first, what did you do when you went to start the fire?

A. I started the air in the pump that atomized the [42] fuel, which takes the place of the steam atomizer, and after I had gotten that going, then I stepped out.

Q. Now, did you throw a burning rag in there?

A. Yes, I throwed a burning rag in before I turned on the air valve. I threw a temporary rag in there to ignite it, and so I threw this burning rag into the boiler, and then turned on the air after I had the air pressure up, and then turned on my oil valve, and forced that onto this burning rag, would ignite the oil and start it burning. That's the way to commence to fire a boiler; after you have the oil and atomized there, that is, the air substitutes as the atomizer until you get your steam up.

(Deposition of Adrian A. Westall.)

Q. Also then you turned on the air, atomizing the fuel, and threw in the burning rag?

A. No, I threw in my burning rag first, and then turned on the oil and air atomizing the fuel.

Q. Approximately how long was the burning rag burning, with the air and fuel all applied to it, before you left to go to the toilet?

A. Well, that's hard to say. I couldn't judge as to minutes. There was a space of time in there.

Q. A few minutes?

A. A few minutes, several minutes.

Q. And what had your instructions been, how much steam were you to get up before you turned on the crude oil?

A. There were no instructions on that. [43]

Q. Well, what had been your experience as to the amount of pressure required?

A. My experience, in firing boilers, is enough to carry the atomizer; so your air is atomizing the oil. You have to get up a sufficient amount of steam for the pressure to atomize your oil. Some boilers will run ten pounds, and some boilers it will run fifty pounds before you can atomize it.

Q. How did this one run, do you recall?

A. Well, I didn't get a chance to find out.

Q. From your experience the day before when you fired it up, how much pressure had you gotten?

A. I think it was thirty pounds, if I remember correctly.

(Deposition of Adrian A. Westall.)

Q. And you did not have that much pressure up when you left to go to the toilet?

A. No, I did not.

Q. Then go ahead and tell us just what happened?

A. Well, after I had the air atomizing the fuel, and it looked like it was well taking care of itself, I stepped out at the stern end of the barge to go to the toilet, and on my way back I heard this explosion, and immediately I proceeded back to where it was, to see what had happened.

Q. And what did you find?

A. Well, I found that the deck in front of the fire box was on fire. And I immediately tried to extinguish the [44] fire, looking around for something to put it out with, and I didn't find it. I used a pair of overalls and jumper that I had myself, to try to beat it out with.

Q. You tried to beat it out with that?

A. Yes.

Q. And what was the result?

A. Well, I don't know what the result was.

Q. I mean, did it spread the fire or put it out?

A. Well, it didn't put it out. If it had put it out, it would not have burnt down. It was not sufficient to smother it out.

Q. And did the flames continue to spread?

A. The flames continued to spread.

Q. And which way from the fire box?

A. Towards the forward end of the barge.

(Deposition of Adrian A. Westall.)

Q. And did you notice the fire extinguisher there?

A. I never knew there was a fire extinguisher. The fire extinguishers were never pointed out to me. No one ever pointed them out to me.

Q. Did you see them there at any time?

A. No.

Q. Even after the fire?

A. After the fire I saw them.

Q. You saw them there then?

A. I saw them on the deck. When they were placed there I couldn't say. They were on the deck of the barge after the [45] fire was over with.

Q. You had not looked to see where they were before that? I mean before the firing up?

A. No, I had not.

Q. Well, then what happened?

A. Well, after the fire had gotten under way, why I couldn't—after it got beyond my control, I left the barge, and when the other workmen arrived I notified them, and they notified the Fire Department, I guess, and they proceeded to lay their fire equipment out and extinguish the fire.

Q. Now, the instructions that you referred to from Foy merely amounted to showing you where the cocks were, is that it, how to turn them on?

A. The instructions I received from Foy was the oil valve, the atomizer valve, how to start the air pump, how to stop the air pump after I had got

(Deposition of Adrian A. Westall.)

enough pressure from the air, and you then proceed with the steam in the boiler as the atomizer.

Q. He didn't give you any instructions as to how long you should stay in attendance before you turned on——

A. (Interrupting) No.

Q. I mean how long you should run the fuel oil before you turned on the crude oil? A. No.

Q. How many pounds pressure, your experience as a fire- [46] man taught you that. How long had you been firing?

A. I had been firing more or less off and on for several years. I couldn't state the amount of years, but several years I had been firing boilers.

Q. Ten or fifteen years?

A. Yes, that's correct, steam boilers that I was acquainted with.

Q. Now, how did this fire occur? Can you tell us?

A. Well, I would say this fire was a combustion, explosion, that's my opinion of it at the time.

Q. Could it have been too much fuel oil was turned on, and it ran down?

A. No, I don't believe so.

Q. In Foy's instructions to you, did he tell you to stay in attendance upon it until you had sufficient, just some general language as to what you were to do to get enough steam? A. No.

Q. Or what did he tell you?

A. He just showed me the valves.

Q. He showed you the location of the valves?

(Deposition of Adrian A. Westall.)

A. Yes.

Q. And, being an experienced fireman, it would have been an insult to tell you how long to stand and watch it?

A. No, I wouldn't say it was an insult. Those boilers work different, there is no two boilers fire alike. [47]

Q. No.

A. That's up to the fireman, he judges that himself, I should say.

Q. Foy didn't say it would be safe to leave it after a little fuel oil was started?

A. Oh, no. No, he never mentioned any time.

Q. Have you ever previously had any experience where the oil line would seem to stop momentarily, when you are generating the oil like this, and then come on again?

A. On boilers, yes.

Q. Did you ever see it spontaneously ignite from the little flame?

A. Yes. A locomotive boiler often does that.

Q. It's not an uncommon experience then for a fireman to see that happen?

A. No. An air bubble forms in there, and maybe it stops the fuel a minute, and then it comes through and ignites that way, and then blew back.

Q. The oil will run out in the meantime, and spread, and then when it lights again you have a fire. Is that it? If you are there you turn it off?

A. Yes.

(Deposition of Adrian A. Westall.)

Q. How long did it take normally to fire up this type of boiler? A. About an hour.

Q. About an hour? [48] A. Yes.

Q. Did you notice the condition of the deck around the fire box?

A. I never took a great deal of notice to that. I noticed it was oily, like so many fire boxes are.

Q. Anything else?

A. No, just the certain amount of oil gathers there.

Q. Any dirt in it, or how would it be?

A. Well, there is naturally a little dirt that you track in and out.

Mr. Darrah: I have six photographs here, and will ask that they be marked for identification as Exhibits 1, 2, 3, 4, 5, and 6.

(The said photographs were marked by the Notary as Exhibits 1, 2, 3, 4, 5, and 6, and returned to counsel.)

Q. Have you seen those photographs? Examine them, please. Do those pictures depict the condition of the Foy Number 2 immediately after the fire?

A. Yes, sir.

Mr. Darrah: I will offer them in evidence as Libelant's Exhibits 1 to 6.

(The said exhibits, by agreement of counsel, were retained by counsel for the Libelant.)

Q. On previous occasions where this sort of thing happened, where you turned on the generating

(Deposition of Adrian A. Westall.)

oil, or whatever you used to generate a boiler that you use crude oil [49] with, where a line went off temporarily, what did you do? What was the best practice as far as what should be done in a situation like that?

A. Well, the best practice, if it didn't come on right away, would be to find out what it was plugged up with, where it was plugged up and what was causing it not to flow freely.

Q. Well, would you normally turn it off and start all over again, as far as the generating process is concerned?

A. Well, if the oil was not flowing, you couldn't start all over again.

Q. Supposing it was burning, and went out, and continued to flow?

A. Well, the oil won't continue to flow.

Q. Did you ever see it do that where it would go out and then continue to flow?

A. Yes, I have seen that. Well, there isn't anything to do unless you stop it altogether. If you stop it altogether, you have to look up where the stoppage is.

Q. If it went out and continued to flow, wouldn't it be a better practice to turn it off and start all over again?

A. Most times it will light itself. Other times you have to throw in a rag. That's your best practice, is to shut it off and proceed over again.

(Deposition of Adrian A. Westall.)

Q. And it's better practice not to leave it while it is generating? [50]

A. Yes, that's correct. Sometimes those things can't be avoided.

Q. You could have turned it off, couldn't you, before you left?

A. Well, I could have, I guess.

Mr. Tweedt: Object to that and move to strike it as argumentative.

A. (Continuing) If you have a certain time to get it fired up in, you have to use all of your time available.

Q. By Mr. Darrah: Well, as a matter of fact, along this line didn't you previously say that on an occasion on November 9, 1941, when Mr. Foy, Ralph Foy and myself and Mr. Ellis were present, that it was not good practice to go off and leave the fire alone? That you should have put out the fire when you decided to go to the toilet?

Mr. Tweedt: Object to that on the ground the Libelant is seeking to impeach its own witness, and no grounds shown for it.

A. Well, it's good practice, I guess. But sometimes you can't help it.

Q. By Mr. Darrah: Well, I was asking, didn't you tell us that on that occasion when we went down to the barge?

A. Yes, I remember telling you that.

Mr. Darrah: That is all, you may cross examine. [51]

(Deposition of Adrian A. Westall.)

Cross Examination

By Mr. Tweedt:

Q. You have fired boilers for about fifteen years, haven't you, Mr. Westall?

A. Yes, sir, approximately that.

Q. And you worked on this particular barge, starting on May 16th, that is the Friday before the fire?

A. That's right.

Q. Now, where did you get the fuel oil with which to ignite the boiler to start getting up your steam?

A. Where did I get it?

Q. Yes. What was the source of supply?

A. It was a five gallon tank, or ten gallon tank, I don't remember which, placed on the starboard side of the fire box.

Q. And the oil flowed by gravity from that point to the fire box?

A. By gravity from that to the fire box, yes.

Q. The barrel was elevated then, was it, above the floor?

A. Elevated above the floor, I would say about fifteen feet.

Q. And what kind of oil did you use?

A. Used fuel oil.

Q. Was it fuel oil, diesel oil or crude oil?

A. Diesel. [52]

Q. Was there diesel oil on the barge when you first went to work on it, in this barrel?

A. Yes, sir.

(Deposition of Adrian A. Westall.)

Q. And this barrel was open, was it?

A. Open top barrel, yes.

Q. This was, from its appearance, a very old barge, wasn't it?

A. Well, not being familiar with barges, that was more or less the second barge I had worked on, and I couldn't judge as to that.

Q. Did you notice a lot of rotten timbers in the barge? A. I never examined the barge.

Q. Back of the fire box there was space on the deck between the water tank, behind the fire box, of a few feet? A. Back of what?

Q. Back of the fire box? A. Yes.

Q. There was a space of a few feet?

A. Between the fire box and the water tank, yes.

Q. Now, the planking around the fire box was saturated with oil, wasn't it?

A. The planking, yes, it was covered with oil.

Q. And that deck was pretty well chewed up, wasn't it? A. Chewed up?

Q. Yes.

A. Well, not any more than any deck that is walked on [53] and seen service.

Q. There was no metal sheeting on the deck, behind the fire box, was there?

A. Directly in front of the fire box, there was a space of about that far (indicating) that was metal sheeting; I would say, if I remember correctly.

Mr. Darrah: Indicating approximately a foot wide, say, with your hands?

(Deposition of Adrian A. Westall.)

A. Well, I would say it was about that wide, and about so long (indicating). I couldn't say the definite number of feet; I would say a foot wide and approximately three feet long. I wouldn't commit myself on that though.

Q. By Mr. Tweedt: Have you a distinct recollection of that, Mr. Westall?

A. I believe I have a distinct recollection of that.

Q. As a matter of fact, isn't that the space where the fire was burning when you came back?

A. No, because this was directly under the boiler, and the fire was burning back quite a bit from that, where it had caught on fire.

Q. What I am talking about, right beneath the fire box, right on the deck there is no metal sheeting of any kind, was there?

A. No. Right beneath the fire box, on the deck, there was no metal sheeting of any kind.

Q. Now, did Mr. Foy, when he showed you how to operate [54] the fire box and the valves and so on, did he point out to you any fire extinguishers on the barge?

A. No, sir.

Q. Did Mr. Foy show you how to operate the water pump?

A. No.

Q. Now, at the time of the fire you tried to operate that pump, didn't you?

A. I did try to operate the pump.

Q. And it wouldn't operate?

A. It would not operate.

(Deposition of Adrian A. Westall.)

Q. That pump also had a hose connected to it, didn't it? A. Yes.

Q. And that hose wasn't long enough to reach the fire box?

A. The hose that was connected was not long enough, and it was full of holes, it couldn't be used to extinguish a fire after we did get it working. There was several places in that hose that had to be tied, as far as I remember.

Q. Now, on the morning that the fire occurred, you started the fire in the way Mr. Foy showed you?

A. I started the fire in the way Mr. Foy showed me.

Q. And you had the air compressor running?

A. Yes.

Q. And you had the diesel oil flowing into the fire box? A. Flowing into the fire box, yes.

[55]

Q. And didn't you observe that that ignited properly? A. Yes.

Q. And did you watch it for some time, to see that it was burning properly?

A. I operated it to see if it was working properly.

Q. At the time you went to go to the toilet, you were satisfied from the manner of operating that it was operating satisfactorily, weren't you?

A. Yes, sir.

Q. Now, at the time that you heard this explo-

(Deposition of Adrian A. Westall.)

sion that you referred to, you were on your way back from the toilet, weren't you? A. Yes.

Q. How far was the toilet from the fire box?

A. Well, I couldn't say just how far it was.

Q. Well, I don't mean exactly, but it's less than 30 feet, or 20 feet or so?

A. It's around 30 feet, I think, from the fire box.

Q. And when you heard the explosion, what did you do?

A. Well, I immediately went back to see what the trouble was. I went back to the fire box, to see what had happened.

Q. How long were you gone, Mr. Westall?

A. I was gone several minutes, anyhow. I don't know just how long it was.

Q. Now, from your experience, Mr. Westall, what is the best way to put out an oil fire? [56]

A. Well, from my experience the best way to put out an oil fire is by smothering it.

Q. Water has a tendency to spread an oil fire, hasn't it?

A. Well, on a gas or oil fire it has a tendency to spread it. Sand will smother it, or smother it with a rug would be the best way to put it out, I would say.

Q. Is that what you tried to do, smother out the fire?

A. That's what I tried to do, smother it out.

(Deposition of Adrian A. Westall.)

Q. The fire spread towards the tool section of the house, did it?

A. The fire extended towards the forward end of the barge.

Q. Now, that whole deck inside the house there was more or less oil saturated and covered, wasn't it?

A. Yes, that's what you call your fire room.

Q. Did the fire spread rapidly, Mr. Westall?

A. Yes, it spread quite rapidly.

Q. Now, you didn't leave the barge until you saw you couldn't do anything more with the fire?

A. I left the barge when I saw that my life was in danger.

Q. And how soon after that did the Fire Department get down there?

A. Well, it was quite a little while. I couldn't say just how long it was. [57]

Q. About half an hour?

A. Half an hour or an hour.

Q. Now, how could this barge be reached, Mr. Westall? A. How could it be reached?

Q. Yes, just where was it located?

A. Well, it could be reached I guess—well, maybe you would call it a plank; and it could be reached by a boat, a rowboat.

Q. The Fire Department could not get down there with heavy equipment, could they?

A. No, they couldn't get down there with heavy

(Deposition of Adrian A. Westall.)

equipment. I would say it was a good mile that they had to string their hose.

Q. Was it a rubber tube that ran from the diesel barrel to the fire box?

A. Well, I couldn't call it a rubber tube. It was a hose.

Q. Or hose, I mean? A. It was a hose.

Q. It was not a metal pipe, was it?

A. It was not a metal pipe, no.

Q. Now, if you had been standing right at this fire box, Mr. Westall, when it was in the condition you saw it as you came back from the toilet, was there anything you could have done that you did not do?

A. No, there was not a thing I could have done that [58] I didn't do. Well, there was one way, if I had known where the fire extinguishers were, I could have used them.

Q. The fire extinguishers were not in the fire room, were they?

A. Well, I never saw any in there. There were fire extinguishers in there after it had been burnt. They were pointed out to me, but my attention was never called to them before. Mr. Foy never called my attention to them.

Q. And Mr. Foy never examined the extinguishers in your presence to see if they were working properly? A. No.

Q. Now, Mr. Westall, it was suggested to you that it was good practice to stand by the fire box

(Deposition of Adrian A. Westall.)

at all times when you have a fire burning in there. Does a fireman ever remain standing right at the fire box all the time the fire is burning?

A. No. It is not the fireman's job to remain at the fire box at all times. He more or less has other jobs to do. A lot of jobs I have been on, you have had to take care of the engine, and see that it is oiled.

Q. When the fire is burning, and you have observed that it is burning satisfactorily, there is no reason for you to suspect that something is going to happen to the equipment, if it is in good condition?

A. No. If it is burning satisfactorily, you can leave it. Of course I have left fires for hours, and sometimes come [59] back, and they would still be burning satisfactorily. And then again I have left them for a few minutes, and they were not. *Some-time* forms there, an air bubble or something defective in the air line, that you can't detect.

Q. Diesel oil is very much more volatile than crude oil, is it not? That is, it burns more readily, and it's more explosive, isn't it?

A. Yes, your diesel oil will burn more rapidly than your crude oil, and it's easier to ignite.

Q. Most boilers that you have fired, have been fired with crude oil, haven't they? A. Yes.

Q. Sometimes backfires are caused by water in the oil, aren't they?

A. That's right. Water can be in there.

(Deposition of Adrian A. Westall.)

Q. And sometimes there is sediment that gets into the line, isn't there? A. Yes.

Q. Are you familiar with the effect of diesel oil on rubber?

A. No, I am not. I couldn't say that I was.

Q. Was the fire spread out when you got back to the fire box, Mr. Westall? A. Yes.

Q. That is, it was not just in one spot?

A. No. [60]

Q. It had spread on to the sides of the boiler?

A. Yes.

Mr. Tweedt: I think that is all.

Redirect Examination

By Mr. Darrah:

Q. You spoke of the planks being soaked with oil; wasn't that more in the nature of like asphaltum that was on there? A. Yes.

Q. Kind of caked with sand and dirt?

A. Sand and dirt and oil.

Q. As a matter of fact, that stuff didn't burn as readily as the bare wood, isn't that true, from your observation of it?

A. This stuff that was soaked, that's directly back of your fire box, there, and it burned pretty rapidly.

Q. Now, where you threw the rag with the oil on it, you didn't throw it on the floor, did you?

A. No, I threw it in this box here (indicating).

Q. And was that lined with bricks, or something?

(Deposition of Adrian A. Westall.)

A. That's lined with bricks on the inside, the fire box.

Mr. Tweedt: When you are referring to the picture, it is not very clear for the record. The box that you are talking about is the fire box that is beneath there? [61]

A. Yes, sir, it's a room back under there, lined with brick. It's part of the boiler.

Q. By Mr. Darrah: Now, where were those fire extinguishers when you saw them, immediately after the fire?

A. They were on the deck of the barge, on the starboard side, if I remember.

Q. Were they near the boiler, or far from it, or where?

A. Oh, they were just laying out on the deck there, on the starboard side.

Q. Ten feet or twenty feet from the fire box, would you say, or can you give us an idea generally?

A. I would say about ten feet.

Q. Isn't it a fact that in your excitement you forgot about the fire extinguishers?

A. Well, I thought about fire extinguishers, but I didn't know where to look for them. They were pointed out to me, and I looked around and I didn't see them. Foy had never pointed those fire extinguishers out to me.

Q. Well, they were not concealed or anything, were they?

(Deposition of Adrian A. Westall.)

A. No, I don't imagine they were. They might have been put in there afterwards for all I know.

Q. What do you mean by that, do you think they were?

A. No, I don't think they were, because I know all equipment has them. I wouldn't say they were. I have never been on equipment that has not had fire extinguishers, and [62] one thing and another. They generally point it out and show you how to handle it.

Q. Now, calling your attention to a conversation—this is in the nature of cross examination, and the witness is an employee of the Respondent, according to our contention—on November 9, 1941, when you, Mr. Ellis and myself and Mr. Ralph Foy were present, do you remember saying that there was a fire extinguisher available, but you forgot about it, in the excitement?

A. No, I don't remember of saying that.

Q. And do you remember saying that it was really carelessness on your part not to stay with the fire during the generation period?

A. No. The fire extinguishers were never pointed out to me.

Q. Would you say you did not say that?

A. I say I did not say that.

Q. You remember the conversation, the place and parties present down on the barge, the conversation I am talking about, don't you?

A. I remember the time we went out to the

(Deposition of Adrian A. Westall.)

barge, but I don't remember making any statement like that.

Q. I mean you remember Mr. Ellis and myself and Mr. Foy being present; do you remember the situation of us being there together on the barge?

A. Yes, I remember the morning we went out there [63] together.

Q. And you didn't say either that you had learned that there was a pyrene fire extinguisher available, but forgot about it in the excitement, and you didn't say it was just carelessness on your part, did you?

A. Well, no fire extinguisher was ever pointed out to me.

Q. No. I am asking you did you say this?

A. No.

Q. You didn't say that?

A. No.

Q. Had you ever had the experience of turning off a stream of fuel such as was going into this fire box, and then turning it on again? A. Yes.

Q. And observing what happened?

A. Yes, I had that experience of turning oil off and on, where you get a combustion of explosion, where it ignites spontaneously. And sometimes it won't cause any damage, and other times, if it's gone too long, and backfires, it will set thing on fire; I have had that experience, yes.

Q. You observed this condition of the floor, re-

(Deposition of Adrian A. Westall.)

specting the oil, prior to the incident of the burning of the barge? A. Yes. [64]

Q. Now, you said you tried to do something with the water pump; what water pump was that?

A. That was the water pump——

Q. (Interrupting) A pump, hand pump, or motor pump?

A. No, it was a gas pump in the stern of the barge. I tried to get it started, to combat the fire with, and I couldn't get it going.

Q. Well, had you started it on previous occasions? A. No, I never had started it.

Q. Were you sure you knew just how to do it?

A. No, I wasn't sure I knew how to do it.

Q. What kind of motor was it?

A. Gas motor.

Q. You are generally familiar with gas motors, are you?

A. Well, I can start one if they will start. Of course I can't say that I can start a gas motor, they don't all start alike.

Q. Now, in your conversation with Foy, was anything said about how much pay you were to receive?

A. Yes, at that time it was according to the Union scale.

Q. No; I mean in your conversation with Foy himself, when he was there?

A. Oh, no. Not with Foy. No, I was sent out there by the Union.

Q. And you reported directly to Bundensen & Lauritzen? [65] Is that correct?

(Deposition of Adrian A. Westall.)

A. That's right.

Q. And the Union, or whoever told you to go out there, told you to report to them?

A. Told me to report to Bundensen & Lauritzen, that's who I was working for.

Q. As far as Foy was concerned, nothing was said about pay or what you were to do, as far as the general operation of the rig was concerned? That is, he didn't tell you whether to use it as a pile driver or what-not? That was somebody else's business?

A. That's correct. I was working for Bundensen & Lauritzen, and I worked there that night, and the next day Foy's man would be there, they said, to show me how to fire the rig. And they were there. They never told me what they were going to do, or what they were not going to do.

Q. Bundensen & Lauritzen determined that?

Mr. Tweedt: Objected to as the witness is not in a position to answer that.

Q. By Mr. Darrah: Who did determine what was to be done as far as the rig was concerned?

A. Well, it didn't make any difference what the rig did, it was not any of my business.

Q. Except as far as you observed?

A. As far as I observed I still don't know what they [66] were doing. They were putting in a coffer dam, if I remember right. That's what they said at that time, I didn't know what that was.

Q. Should there have been another man there to

(Deposition of Adrian A. Westall.)

assist you, so as to leave one to watch that when the other one had to leave?

A. No, I don't think the Union calls for that.

Q. I know, but I am just asking about good practice?

A. Well, I couldn't say whether that is right or not.

Q. It would have been better, in your opinion?

Mr. Tweedt: Better for what? It would be better for him if he had five assistants.

Q. By Mr. Darrah: Better practice?

A. If you are getting down to safety, yes. Of course, precaution can always be used; regardless of how careful you are. I have learned that in the Maritime service in the last few weeks.

Q. Well, who was the engineer on the job?

A. Oh, the engineer of the job, what do you mean, the engineer?

Q. Was there an engineer on the Foy Number 2 at the time? A. The operator?

Q. Yes, the operator?

A. Williams was his name. I forget what his first initial was. [67]

Q. Was he there when you fired up?

A. No. No, he didn't come to work until the crew was called. I believe at the time it was 6:00 o'clock, I forget just what hour was set that morning for them to report for work.

Q. On the previous morning had he not arrived until that time?

(Deposition of Adrian A. Westall.)

A. On the previous morning he took me up that morning. I was riding with him, and he furnished me transportation up there the previous morning.

Q. And was he present on the previous morning when you fired up? Was he on the boat?

A. Yes, he was on the barge.

Q. And did you leave—on the previous morning did you leave the burner at any time during the time you were firing it up? A. Oh, yes.

Q. I mean during the time you were generating it?

A. Oh, yes. The previous morning he took me around the engine, and showed me where to oil, and the cup greases, where to turn down, and how to take care of the engine in general.

Q. You are talking about Williams?

A. No, I am talking about Mr. Foy's employee.

Q. I am talking about Mr. Williams.

A. No, he had nothing to do. He was just the engineer. [68] He operated it. I took care of the oil and firing of the barge.

Q. Well now, during the time you generated enough pressure to make it run on crude oil, the day before, did you remain in attendance on the fuel oil while it was generating? A. No.

Q. Or did you go off and leave it?

A. Oh, no, I went on the forward end and took care of the bull wheel, and took care of the grease, greasing the bucket, and took care of oiling the engines and different places.

(Deposition of Adrian A. Westall.)

Q. Could you hear it from where you were, those places? A. No, I couldn't hear it.

Q. What did you do, just throw the oiled rag in on the previous occasion——

A. (Interrupting) No, that was after I got it running on crude oil. You were asking me after I got it on crude oil.

Q. No, no, I am asking you before that. I am asking you from the time you threw the burning rag in until you got it on fuel oil; while you were generating it, in other words, is that what you call getting fire up?

A. Do you mean while I was running on diesel oil?

Q. Yes. [69]

A. While I was getting it running on diesel oil, I took care of things around the engine room, real close to the engine.

Q. The minute you threw the rag in and turned it on diesel oil, it was running on diesel oil?

A. You have to throw your rag in, your burning rag in, and turn on the oil, and get it ignited.

Q. And then you went away? A. Yes, sir.

Q. The day before? A. Yes.

Q. But nothing happened the day before?

A. No.

Q. And after a while you came back and found quite a little steam on?

A. Yes, and then I cut my diesel out and turned on the crude oil and turned on the steamer.

(Deposition of Adrian A. Westall.)

Q. What did that take, 40 minutes?

A. Forty minutes to an hour. Half an hour to an hour. It all depends.

Q. Did you make any inquiries about anything of Foy that he refused to tell you, when you were there? A. No.

Q. Was he cooperative?

A. Very cooperative.

Q. He seemed to be inclined to tell you anything you [70] wanted to know about it?

A. Yes, he seemed to want to tell me what I wanted to know about it. He was only there about half an hour.

Q. When you went around to the toilet, there was a big water tank that sits on there about eight feet high, and pretty nearly across the whole deck, and is between you and the fire box at that time, is that correct? A. That's correct.

Mr. Darrah: That is all.

Recross Examination

By Mr. Tweedt:

Q. On the day that Mr. Foy showed you how to operate it, after you turned on the diesel, and the fire had started to burning, you didn't stand there and wait until you got up thirty pounds of steam, did you? A. No.

A. He took you around and showed you other things to do?

A. Yes, showed me how to oil and so on.

(Deposition of Adrian A. Westall.)

Q. Have you ever worked on a boiler where you had an assistant fireman?

A. No, I have never worked on one yet where I had an assistant fireman.

Q. And the Union rules don't require that?

A. No.

Q. These backfires you speak of, you are just as apt [71] to have those when you have the crude oil on as when you have the diesel? A. Yes, sir.

Q. The action of firing the diesel with air, is the same as firing the crude with the steam?

A. It is about the same.

Q. Only it is more expensive, using the diesel with air than using the crude with steam?

A. Yes, I would say it is more expensive.

Mr. Tweedt: That is all.

Redirect Examination

By Mr. Darrah:

Q. Of course you didn't inquire of anybody as to where the fire extinguishers were, there was nobody to inquire when the fire started, and before that you had never thought of it?

A. No, I had never thought of it, to inquire of anybody about that. Most boilers have a steam hose laid out for putting out fires. And I didn't notice any. I doubt if there was any.

Q. It would have been immaterial in this instance, because you didn't have steam up, at any rate, would it?

(Deposition of Adrian A. Westall.)

A. Yes, it would have been immaterial because I did not have enough steam.

Q. The same way, the water would have been immaterial because water would spread it? [72]

A. Well, according to my theory with oil fires, water will spread it. The way I put out an oil fire, if you haven't got an extinguisher, is sand and chemicals; that is our information, to put them out with chemicals, I think they call it CO₂.

Q. Now, backfire, when the crude oil is on, is not as dangerous as backfire with the diesel fuel, is it?

A. Yes, I would say it is just as dangerous.

Q. Well, crude oil doesn't burn quickly like diesel fuel, does it? It's harder to light, isn't it? Harder to ignite?

A. Well, crude oil is harder to ignite, but I don't know.

Q. Aren't you apt to have an explosion of your diesel fuel——

A. (Interrupting) Yes, diesel oil is more explosive than crude oil, so I guess from that it would be more dangerous.

Mr. Tweedt: That is all.

Mr. Darrah: Will you stipulate that the exhibits may be retained by myself, and presented at the time of trial?

Mr. Tweedt: So stipulated.

Mr. Darrah: And may it be stipulated that the original deposition may be mailed to Lieutenant

(Deposition of Adrian A. Westall.)

Henry Plattner, at Atwater Barracks, Avalon, Catalina Island, California, and that the witness may read over and sign the deposition [73] before said officer?

Mr. Tweedt: So stipulated.

(Signed) ADRIAN A. WESTALL
Witness

Read over, corrected (no corrections) and subscribed before me this 7th day of July, 1943.

(Signed) HENRY A. PLATTNER
Lieutenant J. G.
U. S. Maritime Service [74]

State of California,
County of Los Angeles—ss.

I, M. A. Clark, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that the above and foregoing deposition was taken before me at 614 Pacific Avenue, San Pedro, California, beginning at 2:30 o'clock P. M., on Saturday, June 12, 1943, pursuant to the stipulation hereto attached; that prior to the beginning of said deposition the said witness, Adrian A. Westall, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said action; that the said deposition was thereupon taken down in shorthand by me, and afterwards, under my personal direction and supervision, transcribed into typewriting; that it was stipulated between counsel that the same might be

read over, corrected and signed before the officer stated in the deposition.

I further certify that I am not related to or employed by any of the parties to said action, nor their attorneys, and am not in any way interested in the event of the same.

Witness my hand and seal this 9th day of July, 1943.

[Seal]

M. A. CLARK

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jul 23 1943. [75]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 3rd day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

CASE ORDERED SUBMITTED; ETC.

This cause came on regularly this day for hearing of issued. After hearing Guard *Darrh*, Esq., Proctor for Libellant, and Lloyd Tweedt, Esq. Proctor

for Respondent, and it appearing that all briefs have been filed, it is ordered that this case stand submitted. [76]

[Title of District Court and Cause.]

Thursday, July 22, 1943

Counsel Appearing:

For Libelant: Darrah & Ellis, by Guard Darrah, Esq. and Agler Ellis, Esq.

For Respondents: Messrs. Derby, Sharp, Quinby & Tweedt, by James A. Quimby, Esq., and Lloyd M. Tweedt, Esq.

Mr. Darrah: May it please the Court, in this matter, this is a libel in personam for recovery of the loss of "Derrick Barge Foy No. 2," case No. 23686-R, brought by the Stockton Sand and Crushed Rock Company against Bundensen.

It is the contention of libelant that "Derrick Barge No. 2" was chartered to Bundensen and Lauritzen by an oral charter on May 15, 1941. A conversation occurred in which Mr. Lauritzen called up Mr. Foy, being a member of the firm of respondents, [77] and Mr. Foy being managing agent of libelant, and asked over the telephone if he was using his Foy "Derrick Barge No. 2," to which he answered, "No."

Mr. Lauritzen said, "I have use for it for a couple of weeks. What will you charge?"

Mr. Foy said, "\$80. I have no crew for it. You will have to furnish your own crew, and we will de-

duct that." Mr. Lauritzen said he did not have steady work for it. Mr. Foy says, "We won't charge you except when you use it. Where do you want it?"

"Just above Sears Point Bridge. How about towing it over?"

"We will tow it, but you will have to pay the towage over and back."

Mr. Lauritzen said, "Is she insured?"

Mr. Foy said, "We are fully covered."

That is the substance of the oral charter. The boat, pursuant to that, was towed over by the libellant and used on the 16th, the 19th, 20th, and burned on the 21st, by respondents. That is, it was used by respondents. The burning occurred while they had it. The crew were procured by the respondents, that is, for instance, Mr. Westall, the fireman, who is involved, was already working for the respondents, and was put on this job. He received general directions from respondents and was paid by respondents, and his social security was deducted and compensation was carried on him, and his services, as were those of the operator, were billed back again or deducted from the \$80 a day on the final adjustment on the cost of the services of the barge when they were paid.

On the morning of the 21st day of May, 1941, Adrian Westall, this fireman, appeared on the boat for the purpose of getting up [78] steam in advance of the time the regular crew appeared for work. The custom was, or the practice of firing that particular barge was to start a little air compressor,

which got up a small amount of air pressure, and then turn on a Diesel oil fuel cock, which was atomized into the burner of the steam boiler, which was ignited by an oil-soaked burning rag. This Westall did, and according to his testimony it was four or five minutes after he had lighted the oil rag and thrown it in, in the process of generating steam; that after 20 or 40 pounds of steam were generated, the pumps were turned on for the crude oil, and steam used to atomize the crude oil, and the crude oil burner then really fired the boiler.

In this particular instance, during the period of generating the boiler, getting up steam, four or five minutes after he lighted it on this morning—I might add, too, this Diesel fuel was fed in by gravity from a little open tank inside the engine room nearby the boiler, 8 to 15 feet away—and on this instance, after only four or five minutes after lighting it, he went away to the toilet. He went out of the engine room and around a very large water boiler which lay crosswise of the derrick barge and astern from the engine room, to the living quarters on the more after part of the barge, and there he went to the toilet in a different building than the one he was working in or firing in. He was gone several minutes, and while away he heard a puff, and upon his return to the engine room he found the floor of the engine room afire. He used his jumper in an endeavor to put out the fire, unsuccessfully. He had not observed, according to his testimony, the location of the fire extinguishers, although they were

there, one on each of the doors leading out of the engine room, and did not use the fire extin- [79] guishers. We will show, too, that even though he was an employee of respondents, he admitted that it was better practice not to leave the fire while he was generating steam. We would like to call at this time——

The Court: I would like to hear from the other side, for the purpose of the record.

Mr. Tweedt: If your Honor please, the position of respondents in this case briefly is as follows: It is our position that this oral agreement between Captain Foy and Mr. Lauritzen, one of the respondents, created a time charter, not a demise charter, or, in other words, was an agreement for the use of the vessel, or for the vessel to do some work for Bundensen and Lauritzen, not an agreement for them to take over and operate the vessel. If that position is established it becomes immaterial whether that fire was caused by negligence or not, because libelant would then become responsible for the safety and maintenance of his vessel. It is also our position that the fire was not due to any neglect. The deposition of this fireman was taken by libelant, and in it he fully sets out what he did in starting the fire, and that he followed the instructions which had been given to him by the libelants.

I think it appears from his deposition that what he did was the proper way of starting the fire. It appears that there must have been some sort of

backfire from the boiler, some sort of explosion, which caused the fire and threw fire and oil out around the boiler, which spread very rapidly and was impossible to control.

This barge was on the tide lands flats, mud flats, of the Napa River, where respondents were building a sewer outfall for the United States Navy. [80]

The Vallejo Fire Department arrived, and the County Fire Department arrived, and had to lay hose for almost a mile in order to reach the barge, a very difficult position in which to fight the fire.

We have those two positions, in the first place that we are not responsible for any negligence, and, in the second place, that there was no negligence.

We come to a third defense, which is to the effect that libelants agreed to insure and keep the barge insured. Libelants did in fact insure the barge, and they did in fact collect the insurance. Under those circumstances we claim there is no liability on the part of respondents. It was insured for \$12,000 and valued at \$12,000.

The Court: The value alleged in the petition is forty, isn't it?

Mr. Tweedt: The value is alleged in the petition to be forty. In the insurance policy the barge was insured at and valued at \$12,000.

The Court: Very well.

Mr. Tweedt: I think it will also appear, your Honor, that the fire, while no one knows exactly the cause, must have been due to some defect in the fuel or in the equipment. The fuel was furnished by the libelant, and, of course, the libelant, whether

it be a time charter or a demise charter, implied the seaworthiness of the barge for the work.

There is also an additional defense. It appears that shortly after the accident the libelant billed the respondents for the services of the barge, and on that bill they reserved the right to claim damages for the loss of the barge by fire. Respondents [81] thereupon wrote to libelants, setting out the contract which had been made, and pointing out that libelants had agreed to carry the insurance, and therefore that there was no liability in any event on the part of respondents. Libelants did not respond to that bill, other than to send a new bill in which they omitted that reservation, and the bill was paid. Very briefly, that is the position of the respondents.

The Court: Call your first witness.

Mr. Darrah: Captain Foy.

ED. M. FOY,

called as a witness on behalf of libelant; sworn.

Direct Examination

Mr. Darrah: Q. Captain Foy, you are one of the officers of the Stockton Sand and Crushed Rock Company?

A. At that time I was secretary and treasurer and general manager.

Q. That is, in May, 1941, in May, 1941?

A. Yes.

Q. And that was a corporation duly organized

(Testimony of Ed. M. Foy.)

and existing under the laws of the State of California? A. Yes.

Q. You knew Mr. Lauritzen, of Bundensen and Lauritzen, did you? A. Yes, sir.

Q. Did you have a conversation with him on or about the 14th or 15th of May, 1941, respecting the Foy "Derrick Barge No. 2"?

A. Our office was in the San Pablo Hotel, and he called me up one morning there and wanted to know if No. 2 derrick was in use, and I told him it was not.

Q. Go ahead and give us the conversation.

A. He said, I think, he would like to use it for a couple of weeks. He said, "What will you charge me?" I says, "\$80 a day, but I haven't got a crew." He says, "I can furnish a crew." "Well," I says, "if you [82] furnish a crew, I will charge you \$80 a day and you pay the crew and charge it back to us," which he did, and as near as I can remember he asked me if it was insured. I says, "We are fully covered, oh, yes." He says, "Well, I may not use it steady." "Well," I says, "we won't charge it for the time you don't use it, but every time you fire up, you must pay for one-half day." That was about all the conversation. It was over the telephone.

Q. Was anything said about towing it over and back?

A. Oh, I asked him where he wanted it, and he told me just above the Sears Point Bridge, and I

(Testimony of Ed. M. Foy.)

says, "We will tow it over there and back, but you will have to pay for the towing," which he did.

Q. Was anything said about—or just what was said, if anything, about deducting——

A. How is that?

Q. ——anything said about deducting the cost of the crew from the \$80 a day?

A. He said he would furnish a crew.

Q. Was anything said respecting the \$80 a day, respecting that? A. 8 hours a day, yes.

Q. No, I say, \$80 a day, was there to be a deduction from that for the cost of the crew?

A. Yes.

Q. Give us just what was said in that respect.
The Court: What was said about that?

A. Well, he was to furnish the crew, and I told him to pay the crew and charge it back to us.

Mr. Darrah: Q. And you would deduct that from the \$80 a day?

A. Yes; and he did do that. I was not keeping books, but I think there was a separate check passed for the crew. I think he paid the bill of \$80 and passed a check back for what he paid the men. We never carried them on our books at all, no compensation or employment or anything. [83]

Q. In other words, that was an adjustment of the rental? A. How is that?

Q. In other words, that was an adjustment of the rental? A. Yes.

(Testimony of Ed. M. Foy.)

Q. How long have you fired steam boilers, if you have?

A. Oh, 40 or 50 years. I am 82 years.

The Court: You, yourself?

A. Yes; I am 82 years old.

The Court: It is a long time since you fired any boiler, isn't it?

A. Not very long.

The Court: How long ago?

A. Oh, 10 or 12 years.

Mr. Darrah: Q. Was any survey made of this vessel prior to the issuance of the last policies on it? A. Not that I know of, no.

Q. Did you carry either Adrian Westall or an operator by the name of Williams on your payroll?

A. I just didn't hear that.

Q. Did you carry either Adrian Westall, a fireman, or an engineer by the name of Williams on your payroll? A. No.

Q. The Stockton Sand and Crushed Rock Company owned this "Foy No. 2 Derrick Barge"?

A. Yes, sir.

Mr. Darrah: That is all—oh, pardon me—one further question I didn't ask you.

Q. I will ask you, Mr. Foy, whether or not it is the exercise of due care for a man to leave a boiler during the period of time he is generating steam?

A. Very dangerous, if you are using oil of any description, and especially with a gravity feed.

Mr. Darrah: That is all. Pardon me, Mr. Tweedt.

(Testimony of Ed. M. Foy.)

Mr. Tweedt: Have you the original bill of May 21, Mr. Darrah?

Mr. Darrah: We haven't the original, but I have our carbon copy. [84]

Cross Examination

Mr. Tweedt: Q. Captain Foy, I will show you a copy of a bill——

The Witness: Please talk a little bit louder. I am a little bit deaf.

Mr. Tweedt: Q. Is that a copy of the bill sent to Bundensen and Lauritzen after the fire?

A. I am not sure I ever saw the bill. I did not keep the books, you know.

Mr. Darrah: We will stipulate that it is, if that will help.

The Witness (examining paper): That looks all right. I wouldn't say positive.

Mr. Tweedt: We will offer this bill in evidence as Respondent's Exhibit.

(The document was received in evidence and marked "Respondents' Exhibit A.")

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT A

May 21

Bundesen & Lauritzen,
Pittsbrug, California.

To use of derrick "Foy #2" and towing same to and from
Vallejo.

May 15.	Towing barge "Foy #2" from Oakland to Vallejo and returning tug to Oakland.	
	10 hrs @ \$5.00 (Oakland to Vallejo).....	\$ 50.00
	5 hrs @ \$5.00 (Vallejo to Oakland).....	25.00
May 16.	Rental on Derrick #2.....	80.00
May 19.	Rental on Derrick #2.....	80.00
May 20.	Rental on Derrick #2.....	80.00
		<hr/>
		\$315.00

Note:—Derrick destroyed by fire 5:00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire.

Your order: Mr. Lauritzen
Our order: 49-41

Mr. Tweedt: Q. Captain Foy, Bundesen and Lauritzen returned this bill to your office, did they not?

A. Yes, I suppose so.

Q. And with it they sent a letter?

A. How is that?

Q. With it they sent a letter. Have you the letter of May 29?

A. I don't think I ever saw the letter.

Mr. Darrah: We will stipulate we received that letter.

(Testimony of Ed. M. Foy.)

Mr. Tweedt: We will offer as Respondents' Exhibit B this letter dated May 29, 1941.

(The document was received in evidence and marked "Respondents' Exhibit B.")

RESPONDENTS' EXHIBIT B

[Letterhead]

BUNDESEN & LAURITZEN

General Contractors

Industrial Row—Telephone 47

Pittsburg, Calif.,

May 29, 1941

Stockton Sand & Crushed Rock Co., Inc.

Hotel San Pablo

Oakland, California

Gentlemen:

We are returning your invoice dated May 21, 1941 in the amount of \$315.00.

We refer to your note on the above invoice. Our agreement with Mr. Foy, Sr. was to the effect that they were to furnish the derrick barge at \$10.00 per hour, which rental was to include the operator and fireman, water, fuel and oil, and insurance. It was further agreed that we were to pay for moving in and out of the derrick and also for the actual time the derrick barge was used, but at no time for less than 4 hours after the barge had been steamed up, in which case we would be responsible for the balance of the time (after the first 4 hours) of the

(Testimony of Ed. M. Foy.)

operator and the fireman, who have to be paid for a minimum of 8 hours per day.

As your company agreed to carry the insurance we cannot assume any liability in connection with the fire.

Yours truly,

BUNDESEN & LAURITZEN
WARNER FORSELL

CG

enc.

Mr. Tweedt: I would like to read that letter to your Honor at this time. I would also like to call your Honor's attention to this bill, the first exhibit. On it there is a note which states: "Derrick destroyed by fire 5:00 a. m. on May 21st. Additional charge will be made for towing hull to Greenbrae when [85] released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire."

Respondents' Exhibit B reads:

"We are returning your invoice dated May 21, 1941 in the amount of \$315.

"We refer to your note on the above invoice. Our agreement with Mr. Foy, Senior, was to the effect that they were to furnish the derrick barge at \$10 per hour, which rental was to include the operator and fireman, water, fuel

(Testimony of Ed. M. Foy.)

and oil, and insurance. It was further agreed that we were to pay for moving in and out of the derrick and also for the actual time the derrick barge was used, but at no time for less than four hours after the barge had been steamed up, in which case we would be responsible for the balance of the time (after the first four hours) of the operator and the fireman, who have to be paid for a minimum of 8 hours per day.

“As your company agreed to carry the insurance we cannot assume any liability in connection with the fire.”

Q. Captain Foy, did the libelant, the Stockton Sand and Crushed Rock Company, make any reply to that letter?

A. I couldn't tell you. I didn't keep the book, and had nothing to do with the correspondence at that time. I don't know whether I had anything to do with it, or not. I will read it and see (examining document). I don't think I ever saw that. I am not positive.

Q. You know of no reply that was made to it?

A. No; I know of no reply.

Q. Are you familiar with that bill, Captain Foy?

A. What is this [86] here?

Q. I am referring just to the typewriting.

A. That looks all right. I don't know that I ever saw it.

Q. Did you ever see this bill?

(Testimony of Ed. M. Foy.)

A. No; I never saw that. My impression is there was a check passed covering that. I know what the books show at the present time, but that I don't know——

Mr. Tweedt: Would you stipulate, Mr. Darrah, that this bill dated May 31, was sent to Bundensen and Lauritzen following receipt of that letter of May 29?

Mr. Darrah: Could I ask Ralph? I don't really know; this one, we received a copy of that. I can stipulate to that.

Mr. Tweedt: These two went together (indicating papers)?

Mr. Darrah: I don't know; I never saw that before, or even a copy of it. May I see that one (examining papers)? I am sorry. I don't know anything about that, not having seen it, but it looks as if it might have been sent out by some stenographer in the office.

Mr. Tweedt: I move to strike out that gratuitous remark by counsel.

The Court: Granted.

Mr. Tweedt: Q. Captain Foy, this is the regular form of bill head used by your corporation, is it not?

A. Yes.

Mr. Tweedt: I will ask that these two bills be marked for identification, if the Court please.

Mr. Darrah. If you will say you received that through the mail from us, I will stipulate. I don't know anything about it, is all.

Mr. Tweedt. I did not know there was any dispute about it.

(Testimony of Ed. M. Foy.)

Mr. Darrah. I don't think there is.

(These two bills referred to were marked Respondents' Exhibits [87] C and D For Identification.)

RESPONDENTS' EXHIBIT C

[Bill Head]

Oakland, Cal., May 31, 1941

M. Bundesen & Lauritzen,
Pittsburg, California.

In Account with
STOCKTON SAND & CRUSHED ROCK CO., INC.
River Sand . Crushed Rock . Towing
Clam Shell Digging and Unloading . Pile Driving
Hotel San Pablo

All Bills Due 10th of Month following Delivery

To use of derrick "Foy #2" and towing same to and
from Vallejo.

May 15.	Towing barge "Foy #2" from Oakland to Vallejo and returning tug to Oakland.....	\$ 75.00
May 16	Rental on Derrick "Foy #2" 8 hrs @ \$10.00.....	80.00
May 19	Rental on Derrick "Foy #2" 8 hrs @ \$10.00.....	80.00
May 20	Rental on Derrick "Foy #2" 8 hrs @ \$10.00.....	80.00
		<hr/>
		\$315.00
		76.12*
		<hr/>
		\$238.88*

\$375 less \$76.12 as per attached bill.*

June 11th*

Your order: Mr. Lauritzen

Our order: 49-41

Note:—(*) indicates pencil writing on bottom of bill head.

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT D

[Bill Head]

BUNDESEN & LAURITZEN

General Contractors

Industrial Row—Telephone 47

P. O. Box 470

Pittsburg, Calif., May 31, 1941

Sold to Stockton Sand & Crushed Rock Co., Inc.

Hotel San Pablo

Your Order No.....

Oakland, California

Job No. 375

Terms: Net Cash

Interest Charged at 8% After 30 Days

All Agreements Contingent Upon Strikes, Fires or Other
Interruptions Beyond Our ControlTo services of engineer and fireman on the "Foy
2" at Vallejo to be deducted from rental of
derrick as billed May 31, 1941 as per agreement.

May 16	Engineer	8 hours @ 1.60.....	\$12.80
	Fireman	8 hours @ 1.10.....	8.80
May 19	Engineer	8 hours @ 1.60.....	12.80
	Fireman	8 hours @ 1.10.....	8.80
May 20	Engineer	8 hours @ 1.60.....	12.80
	Fireman	8 hours @ 1.10.....	8.80
			<hr/> \$64.80

Compensation 12.24, B. I. & P. D. 1,227, Old
Age 1.00 and State & Fed. Unemployment
Insurance 3.00%; Total 17.467% on above or... 11.32

\$76.12

Mr. Darrah. Q. Did you folks receive them
through the mail?

Mr. Tweedt. Yes; the one bill from Stockton

(Testimony of Ed. M. Foy.)

Sand and Gravel was received through the mail. The other is a copy of one mailed by the respondents to libelant, of which I understand you have a copy in the files.

Mr. Darrah. Yes; that is correct. I have a copy of that.

Mr. Tweedt. Will you stipulate, Mr. Darrah, that this letter was sent to Bundensen and Lauritzen through the mail (indicating document)?

Mr. Darrah. What is the date of that?

Mr. Tweedt. July 8, 1941.

Mr. Darrah. Yes.

Mr. Tweedt. And that this bill dated May 31—

The Court: Identify it, for the purpose of the record.

Mr. Tweedt: Yes; this bill which is marked Respondents' Exhibit C For Identification, was enclosed with this letter.

Mr. Darrah: Was it? If you say it was, all right.

Mr. Tweedt: It was.

Mr. Darrah: Yes; I have no reason to doubt it.

Mr. Tweedt: We will offer in evidence, then, this bill for \$315, marked Respondents' Exhibit C For Identification, and this letter from Stockton Sand and Crushed Rock Company to Bundensen and Lauritzen dated July 8, 1941, as Respondents' next exhibit.

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT E

[Letterhead]

STOCKTON SAND & CRUSHED ROCK CO.,
Inc.

River Sand . Crushed Rock . Towing
Clam Shell Digging & Unloading
Pile Driving
Hotel San Pablo
Telephone HOliday 5900
Oakland, California

July 8, 1941.

Bundesen & Lauritsen,
Pittsburg,
California.

Gentlemen:—

Attached is our statement covering work done for your company during the months of May 1941 at your Vallejo job.

Will you kindly forward check to cover at your early convenience, as these bills were payable June 10th.

In connection with the charge against this company for employee wages for derrick "Foy #2" will you let me have bill covering this charge at once in order that same may be passed for payment.

Under date of June 20th, I wrote you regarding line and anchors which were not returned when derrick "Foy #2" was removed from the Vallejo job. Will you kindly let me have an early answer

(Testimony of Ed. M. Foy.)

as to when I may expect return of this line and the anchors.

Yours very truly,
STOCKTON SAND & CRUSHED
ROCK CO., Inc.,
By O. E. FOY,
Accountant

OEF:f
encl.

The Court: I suggest you read them in the record now.

Mr. Tweedt: I beg your pardon?

The Court: You have not read them in the record yet.

Mr. Tweedt: This bill, your Honor, dated May 31, to Bundensen and Lauritzen is identical in amount and items with the bill previously introduced as Exhibit A for \$315, but it [88] does not——

The Court: There was an accompanying letter with it.

Mr. Tweedt: I will read that.

The Court: Very well.

Mr. Tweedt: But the bill of May 31st omitted the reference as to liability for damage to the barge.
(Reading letter:)

“Attached is our statement covering work done for your company during the months of May, 1941 at your Vallejo job.

“Will you kindly forward check to cover at

(Testimony of Ed. M. Foy.)

your early convenience, as these bills were payable June 10th.

“In connection with the charge against this company for employee wages for derrick ‘Foy No. 2’, will you let me have bill covering this charge at once in order that same may be passed for payment.

“Under date of June 20th, I wrote you regarding line and anchors which were not returned when derrick ‘Foy No. 2’ was removed from the Vallejo job. Will you kindly let me have an early answer as to when I may expect the return of this line and the anchors.”

In lieu of putting all these documents in evidence, your Honor, the parties will stipulate that the bill for \$315, less the bill from the respondents for \$76.12, covering wages of the fireman and operator, were paid by the respondents to the libellant.

The Court: The record will so show.

Mr. Tweedt: Q. Captain Foy, this letter which is Respondents’ Exhibit B, which you have just read, that sets forth correctly, does it not, the substance of your agreement with Mr. Lauritzen?

A. How is that?

Q. I say, that letter sets forth the substance of your conversa- [89] tion with Mr. Lauritzen about May 14 correctly, does it not?

A. (Referring to letter) The water, fuel—yes, we furnished it, water and fuel—yes, that is correct.

The Court: Read it again so he can follow it.

(Testimony of Ed. M. Foy.)

(Mr. Tweedt thereupon commenced re-reading the letter referred to.)

Mr. Darrah: Pardon me, Mr. Tweedt. Could I ask you to read it just a little louder? Mr. Foy can't hear it in that tone of voice.

The Witness: You see, I am so deaf I can't hear your conversation.

Mr. Tweedt: You tell me if I am not loud enough.

The Witness: Yes.

(Mr. Tweedt thereupon re-read the letter referred to.)

The Witness: The question was asked as regards to our insurance, and I said that we were fully covered, but we can't cover—it is impossible for us to cover—under an insurance policy, a third party without we consent the insurance company and put a rider on the policy.

Mr. Tweedt: Q. You told Mr. Lauritzen that?

A. No; nothing said about it at all. I just said, "We are fully covered."

Mr. Tweedt: That it is a conclusion of law and I move to strike it out.

The Court: Very well.

The Witness: We are fully covered, but we can't cover a third party without getting the endorsement of the insurance company.

Mr. Darrah: I didn't get your Honor's ruling on this. Of course, it was a conclusion that Mr. Tweedt asked Mr. Foy [90] for.

The Court: Read it, Mr. Reporter.

(The reporter read the record as requested.)

(Testimony of Ed. M. Foy.)

Mr. Darrah: Was there an objection to that? The gist of the whole conversation, if this letter represented the conversation chartering the boat, that called for a conclusion. This is a conclusion.

Mr. Tweedt: Mr. Foy gave us his conclusion as to insurance. He did not state that conclusion to Mr. Lauritzen. I moved to strike his conclusion, not only on the ground that it is a conclusion, but as a matter of law it is not sound.

The Court: Read it again, Mr. Reporter.

(The reporter again read the record as requested.)

Mr. Darrah: As I understand, the captain now is qualifying his answer to the earlier question as to whether or not that contained everything in the agreement.

The Court: It may go out in its entirety, so there will be no question about it. Now develop the facts, whatever they may be.

Mr. Tweedt: Q. Captain Foy, you didn't tell Mr. Lauritzen that the insurance could not cover him without the consent of the company?

A. It was not mentioned about covering him, at all.

Q. What you told him was that "We are fully covered"?

A. I said we were fully covered. That was the total conversation in regard to that, I think.

Q. Mr. Foy, you stated that the barge was—that the charge for the barge was to be \$80 a day?

A. Yes; that is what it was.

(Testimony of Ed. M. Foy.)

Q. It was really to be \$10 per hour, was it not?

A. Yes; nothing less than half a day.

Q. But the basis of the charge was an hourly basis, was it not? [91]

Q. Captain, the bill that was sent making charges for the use of the barge at \$10 per hour, that charge of \$10 included the wages of the operator and fireman, did it not?

A. It included the wages, yes, because we was—he was to deduct it, what he paid for the men, from the bill, which I think he did. I think you have got bills to that effect.

Q. Captain Foy, did I understand you to say that you did not have a crew for the “Foy No. 2” when you talked to Mr. Lauritzen?

A. That is right. We did not have a crew for it.

Q. Will you explain why, then, the arrangement of \$10 per hour was to include the wages of the crew?

A. Because he said he would furnish the crew.

Q. What I mean is, why did your charge include the wages of the crew, if you did not have any crew?

A. I suppose he did not figure up just what he was going to pay the crew. We took his word for how many hours he used it. I don't know how many hours he used it. We took his word for how many hours he used it.

Q. I mean the rate of charge, that is, \$10 per hour; if you had no crew why did such a rate include the wages of the crew?

(Testimony of Ed. M. Foy.)

A. We couldn't take out the wages, as I understand it, we couldn't take out the wages of the crew until we knew what it was. In fact, I never saw the crew until afterwards. I don't know who they was; didn't know who they was.

Q. The charge for the crew is a union fixed charge, is it not?

A. Out of the \$10 an hour. What he paid the men I don't know. We took his word for what he paid the men.

Q. The charge for operator and fireman on the barge is a union fixed scale, is it not?

A. I think so.

Q. Captain, did you go up to the Bundensen and Lauritzen job at Vallejo when the "Foy 2" was taken up there? A. At what time? [92]

Q. The day the barge was taken up to the Vallejo job. A. No; no.

Q. Were you up there that evening after she had arrived?

A. No. The first time I was on the barge was after it burned up.

Q. You were not up there at any time she was working?

A. I went up after it was burned up, with the inspector and one of the insurance men.

Q. You were not up there at any time she was working? A. No.

Q. And you were not up there the night she arrived up at Vallejo? A. No, sir.

(Testimony of Ed. M. Foy.)

Q. Did you have any conversation with Mr. Lauritzen or Mr. Kitchen with respect to the crew of the barge at any time after she went up to the Vallejo job?

A. Mr. Lauritzen; I had a conversation with Mr. Lauritzen. Mr. Darrah and I met him on the road, I think, just above the bridge, Sears Point Bridge, and we was trying to locate the fireman. We wanted to talk to the fireman.

Q. This was after the fire?

A. This was after the fire, yes; not before.

Q. You did not have any conversation with him before the fire?

A. No; I never saw him after—all the conversation we had was over the telephone.

Q. The conversation you had with Mr. Lauritzen over the telephone about arranging for the use of the barge, I think you said that he called you at the Hotel San Pablo in Oakland.

A. Yes; that is where.

Q. As a matter of fact, Captain, didn't he call you at home in Stockton?

A. No; I don't think so. I don't know why he should, because I was down there practically all the time. He might have called my home before and found out I was not there, or something, but the bargain was all made over the telephone in [93] the San Pablo Hotel.

Q. Captain, in your conversation with Mr. Lauritzen about May 14th when you were talking about

(Testimony of Ed. M. Foy.)

the barge, was anything said in that conversation about responsibility for damage to the barge?

A. I just didn't quite understand that.

Q. When you had this conversation with Mr. Lauritzen about May 14th—— A. Yes.

Q. ——when he was talking about getting to use the barge—— A. Yes.

Q. ——was anything said about responsibility for damage to the barge?

A. Nothing spoke about it, at all.

Q. Did you say anything about the condition of the barge? A. No.

Q. Didn't you say at that time it was in good condition?

A. I don't think I did. The barge, itself, was not in good condition. The barge, itself, the hull, was a very—but the machinery was in excellent condition.

Q. The barge had been laid up for some time, hadn't it?

A. Not but a little. It had been laid up, oh, I would say not more than a week, that we had it down on the Estuary there unloading some stuff for the Government, I think it was, or for somebody.

Q. Were you aware, Captain, that three hours of rigging work had to be done on the barge on May 16th before she could be used?

A. I don't know that there was anything done on it; I don't know that there was anything wanted

(Testimony of Ed. M. Foy.)

to be done on it. I had just paid \$800 for new flues in it a short time before.

Q. Were you told that the drums on the winches on the barge would not overhaul?

A. I had been on the barge a good many times. Of course, I never run the derrick. I have been on there [94] and fired it, but I never did start a fire. I never started a fire on it, but I have watched it after we got started, but as far as I know, everything was working all right, because I know the last time I saw it run down there at the foot of Fifth Avenue, it was lifting some very heavy stuff, very heavy, and the winches and everything worked O.K.

Q. The hull of the barge, Captain, was pretty well covered with dry rot, wasn't it?

A. There was some rot on the sides, and the deck was not in any too good condition. It was an old barge. The barge was 36 by 137, a very big rig, and it was subject to handling at least 10 or 12 tons.

Q. Before the barge was taken from Oakland to go up to Vallejo for this work, you put fuel oil aboard her?

A. It was full, I know. I don't know just when they filled it, but the crew had filled it. I don't know whether they filled it as they took it out, or before.

Q. And the Diesel oil?

A. Fuel oil; and our Diesel oil, never carried but just a barrel.

Q. Just the barrel that runs to the firebox?

(Testimony of Ed. M. Foy.)

A. Just for starting fires; that was all we used that for.

Q. Captain, the "Foy No. 2" was fully insured, was she not, on May 21st, the day of the fire?

A. It was covered for all kinds of losses. I have got three boats insured now that insured the same way.

Q. In any event, the insurance covered fire?

A. The insurance covered for all kinds of losses, but not for full value.

Q. In the policies is not the "Foy No. 2" insured for \$12,000? A. Yes.

Q. And was it valued at \$12,000?

A. Valued for \$12,000, yes.

Q. After the fire you were paid the full amount of \$12,000? [95] A. Yes.

Q. And so far as the \$12,000 are concerned, you are prosecuting this action for the benefit of the insurance company?

A. Not entirely, no; I would have some interest in it, but the insurance company, of course, is the big beneficiary of getting their money back, but they—I have got to explain that I have got a barge right now, or a tug that was surveyed at \$8138 value. They made me carry insurance on it for \$12,000. The insurance company is boosting our insurance. They want more insurance. They valued replacement at \$17,500 in the policy; it shows in the policy. We try to get off with as little insurance as we can and have it cover all the damage possible.

(Testimony of Ed. M. Foy.)

Mr. Darrah: You are reserving the issue of damages?

Mr. Tweedt: Yes.

Q. Captain, in your libel filed in this action, that is, the pleading filed in this action, it is alleged this conversation you had with Mr. Lauritzen was on or before May 5. Is that correct?

A. I don't remember the date. I couldn't swear to the date. I think some of the records there will show the day we took it up.

Q. The bills show it went up on May 15th, and the conversation was very shortly before that time, was it not?

A. Very shortly before that time, as I remember it, yes.

Q. Now, Bundensen and Lauritzen had also during May had your "Foy No. 1" barge at this Vallejo job, did they not?

A. I don't know whether they did or not. No. 1 is a very small rig, you know.

The Court: We will take a recess until 2:00 o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [96]

Afternoon Session, July 22, 1943, 2 P. M.

The Court: Proceed, gentlemen.

ED. M. FOY,

recalled :

Cross Examination
(resumed)

Mr. Tweedt: Q. Captain Foy, did you ever make a claim upon Bundensen and Lauritzen——

The Witness: I don't hear.

Mr. Tweedt: Don't you hear me?

The Witness: No; I don't. I am quite deaf, too bad.

Mr. Tweedt: Q. Did you ever make a claim upon Bundensen and Lauritzen for damages to the barge before you filed the libel in this action?

A. Not personally, I didn't, I don't think; I don't remember of it.

Q. Do you know of any claim made by the company? A. I don't know; I don't know.

Mr. Tweedt: That is all.

Redirect Examination

Mr. Darrah: Q. Captain Foy, you know that, acting as your attorney, I took the matter up with Bundensen and Lauritzen?

The Witness: You had better come a little closer, too. I don't hear you back there.

Mr. Darrah: Q. I say, you know that, acting as your attorney, I took the matter up with Bundensen and Lauritzen before filing the libel, as your attorney?

A. Oh, yes, yes; that is right; I do know of you. I knew what you was doing, but I—that is about all I knew about it.

(Testimony of Ed. M. Foy.)

Q. Now, Captain Foy, calling your attention to this letter, Respondents' Exhibit B, dated May 29, 1941, concerning which you [97] have testified——

The Witness: That is a letter from Bundensen and Lauritzen?

Q. Yes. Mr. Tweedt asked you the question if that substantially contained the terms of your verbal charter, verbal agreement. A. Yes.

Q. When you answered "Yes" to that, had you noticed that it had a reference to insurance in it?

A. There is no record here of any insurance. Let us see what it is, "Your company agrees to carry insurance"—"We cannot assume any liability." That was not mentioned. Positively the only question between Mr. Lauritzen and me was, "Have you got insurance?" and I said, "We are fully covered."

Q. What was that with reference to? What had you just been talking about before you stated that?

A. In regard to the towing, and, well, I suppose the use of the barge, but never was mentioned about covering them.

Q. You mean at the time you had the conversation over the phone where you made arrangements for leasing it to them; you mean nothing was said about covering them? A. No; nothing at all.

Mr. Tweedt: I object to that question, your Honor. It assumes something not in evidence. Whether or no the barge was leased is one of the issues in the case.

(Testimony of Ed. M. Foy.)

Mr. Darrah: That was solely for the purpose of calling his attention to the conversation.

Mr. Tweedt: It will be in the record if I don't object to it.

The Court: The objection will be sustained. Let it go out.

Mr. Darrah: Q. And in this letter by Mr. Lauritzen, the letter to you of the 29th, he said the \$10 per hour was to include the operator and fireman, water, fuel and oil, and insurance. [98]

A. That was to cover everything, yes, as far as that is concerned.

Q. But the insurance was not to cover him, as far as your understanding went, was it?

A. It was not mentioned in that.

Q. Did you ever have any settlement of this case with Bundensen and Lauritzen? Did you ever settle this case with Bundensen and Lauritzen?

A. No, sir.

Q. Did you ever give a release of liability for the loss of the barge?

A. I have not seen Mr. Lauritzen since the day we met him up there at the boat.

Q. You were general manager of the corporation at this time, were you not, and subsequently for some time? A. Yes.

Q. For a year or more before you retired?

A. 27 years.

Q. Was it a year or more after this before you retired? A. Yes; until the 1st of April.

(Testimony of Ed. M. Foy.)

Q. What year? A. This year.

Q. This year?

A. Yes; I have been in active control until the 1st of April this year.

Mr. Darrah: That is all.

Recross Examination

Mr. Tweedt: Q. Captain Foy, you did, though, as I understand it, tell Mr. Lauritzen that the barge was fully insured?

A. I told him we was fully covered. That is as near as I can remember the words I used.

Q. You also told him you would keep the insurance in effect?

A. No, sir; I never mentioned it. All the conversation was, he asked if we had insurance, and I said, "We are fully covered." That is all the conversation there was in regard to insurance.

Mr. Tweedt: That is all.

Mr. Ellis: Lieutenant Commander Smith. [99]

THOMAS W. SMITH,

called as a witness on behalf of libelant; sworn.

The Clerk: Will you state your name?

A. Thomas W. Smith.

Mr. Ellis: If the Court please, we ask indulgence to put Commander Smith on a little bit out of order here. He tells me he has managed to get a few

(Testimony of Thomas W. Smith.)

minutes off, but is very anxious to get back to his work.

The Court: There is no objection to that.

Direct Examination

Mr. Ellis: Q. Your name is Thomas W. Smith?

A. Yes.

Q. You are a Lieutenant Commander in the Navy at the present time? A. Correct.

Q. Prior to your going into the Navy, you held, or do you still hold, license in the United States Steamboat Inspection Service? A. I do.

Q. You still hold that? A. Yes.

Q. Also unlimited chief engineer for ocean-going vessels, both steam and Diesel? A. Correct.

Q. You have been a marine surveyor for some time? A. I have.

Q. That is probably your work now, inspection of boats? A. I am in the Navy now.

Q. I mean in the Navy. I notice you are in the inspection and procurement department of the Navy; is that correct? A. That is right.

Q. Commander Smith, are you familiar with the—you know of the barge "Foy 2," do you not?

A. I do.

Q. Do you know what kind of a boiler it had?

A. It is a vertical Scotch boiler.

The Court: What?

The Witness: It is a vertical Scotch boiler. [100]

The Court: What does that mean?

The Witness: An upright fire tube boiler.

(Testimony of Thomas W. Smith.)

Mr. Ellis: Q. That boiler runs, ordinarily, on crude oil; is that correct?

A. It did; yes.

Q. Assuming that the method of starting a boiler was that Diesel oil was used to start, fed by gravity, fed from a barrel adjacent to the boiler; now, on the assumption that this Diesel oil was atomized by air, a little compressor run by a gas engine, and is fed into the boiler atomized by air pressure, assuming that a man would throw a burning rag into the firebox, turn on the Diesel oil from the tank, which flowed by gravity, and then assuming that it took approximately thirty minutes to an hour to generate enough steam to atomize the crude oil, and assuming he had just thrown the rag in there to start with the air and the Diesel oil, and had been going approximately two or three minutes, that the operator then left for perhaps three or four minutes, would you say that was using due care in the starting of that boiler?

A. Not with all those assumptions. He should stay close to the fire.

Q. He should stay close to the fire?

A. Yes.

Mr. Ellis: I think that is all.

Cross Examination

Mr. Tweedt: Q. You are familiar with this barge, "Foy No. 2"? A. I have seen it.

Q. Do you recall that the Diesel oil was contained in a barrel, an open barrel, on the port side

(Testimony of Thomas W. Smith.)

of the engine room, elevated some five feet or so off the floor, and that a rubber hose ran from the barrel down to the firebox?

A. I don't recall the construction, because I hadn't seen it for about five or six years.

Q. Assuming the construction was as I have stated, Lieutenant [101] Commander, that is a very makeshift arrangement for firing a boiler, isn't it?

A. Yes.

Q. Diesel oil has a very harmful effect upon rubber, has it not?

A. Yes; it is not good for it.

Q. And the fuel supply ordinarily runs to the boiler through a metal pipe, does it not?

A. Right.

Q. Now, Lieutenant Commander, in answering the hypothetical question that was given to you, if the fireman had watched the firebox long enough to be satisfied that it was operating properly, you wouldn't expect him to stand in front of the firebox and watch it from then on, would you?

A. He should be close by it.

Q. A fireman has many duties, has he not, on the barge? A. That is right.

Q. And those duties take him away from the firebox? A. Short distances, yes.

Q. If the fireman were 30 or 40 feet from the firebox, you wouldn't consider that an unsafe distance from the firebox, would you?

A. If he was within sight of it, where he could see it, it would be all right.

(Testimony of Thomas W. Smith.)

Q. Is there any greater risk, Lieutenant Commander, when the method of operation that was described to you by counsel's question—is there any greater risk while the Diesel oil is running with the air compressor than when crude is running with the steam?

A. There is a greater risk when the Diesel oil is on than when the crude oil is on.

Q. For what reason?

A. The crude oil has a higher flash point.

Q. Your answer is based entirely on the types of oil used? A. Yes.

Q. It is not customary to fire a boiler of this type with Diesel [102] oil, is it?

A. It is not a practice.

Q. This boiler was built to fire with wood?

A. Wood or coal or crude oil.

Q. It was a very old type of logging boiler, was it not? A. Yes.

Q. Had you seen this barge recently; that is, prior to May 21, 1941? A. No; I had not.

The Court: I believe your testimony was you saw it about five years before.

The Witness: About five years, I saw it in the distance, your Honor, but I was not aboard it, or anything like that.

Mr. Tweedt: Q. What is the reason you think a man should stand next the firebox while the Diesel oil is running?

A. In the merchant marine, we always make

(Testimony of Thomas W. Smith.)

them stay close to the fires when they are lighting off.

Q. These men on the derrick barge are not merchant marine? A. I don't know.

Q. They are not subject to inspection by the United States Steamboat Inspection Service, are they?

A. I don't think they are, no.

Q. If an air bubble develops in the line, or anything that would stop the flow of the fuel, that might develop just as well with the crude on as with the Diesel on? A. Yes; I think it might.

Mr. Tweedt: That is all.

Redirect Examination

Mr. Ellis: Q. Commander, counsel suggested that you assume that the feed from the Diesel oil tank to the burner was a rubber hose. Now, I will ask you to assume that it was an iron pipe but connected at the place where the iron pipe goes into the Diesel oil tank with a short length of tubing or hose to prevent destruction by vibration. Would that be a normal method of [103] attaching that?

Mr. Tweedt: Where was the rubber hose that you refer to? The question is not clear to me.

Mr. Ellis: I am assuming it is up at the Diesel tank.

The Witness: It is not a proper method of connection; no.

Q. Would that be a proper method, assuming

(Testimony of Thomas W. Smith.)

that the jolts of the barge, and so forth, might shatter the connections?

A. No; it is customary to put a flexible tubing in.

Q. What would that be made of? A. Metal.

Q. Flexible metal tubing. Now, Commander, assuming a man, a fireman, had been working for fifteen years on steam boilers, in your opinion should it be necessary to tell him, in instructing as to the method of firing the boiler, should it be necessary to instruct him to remain close in attendance, as you term it, while lighting off, that is, firing up?

A. I think that would depend entirely on who the man was.

Q. Isn't it a sort of elementary principle among firemen that you should be in attendance on a boiler when you are firing up, or lighting off, as you say?

A. They usually always watch it.

Q. Counsel suggested that perhaps during the time the boiler was going the man went other places about the barge. During this particular period, in your opinion, would it be good practice, assuming that the engine room was enclosed, with solid doors on it, would it be good practice to leave that engine room during the time it was generating, so that you couldn't see the firebox or anything going on in there?

A. He should be in sight of it, as I say.

Mr. Ellis: He should be in sight of the firebox. That is all.

Mr. Darrah: We will call Henry Foss.

(Testimony of Thomas W. Smith.)

This witness, too, is called out of order, inasmuch as perhaps [104] his testimony should follow the deposition, but he is anxious to get to his work.

HENRY FOSS,

called as a witness on behalf of the libelant; sworn.

Direct Examination

Mr. Darrah: Q. Your name is Henry Foss?

A. Yes, sir.

Q. What is your occupation, Mr. Foss?

A. At the present time I am business representative for Local 3 of the Operating Engineers.

Q. And you are an operating engineer?

A. I have been paid as such for about 35 years.

Q. You have had experience firing steam boilers?

A. Yes.

Q. Have you ever fired one of the type described by the witnesses here as an upright Scotch boiler?

A. 13 years on the last time I was on the same type of boiler.

The Court: Why do they call it a Scotch boiler?

The Witness: I couldn't tell you why they give that particular definition. It was invented by a Scotch party. I can't recall where it came from. This particular type of boiler I refer to is a vertical tubular boiler with the name "Scotch."

Mr. Darrah: Q. Let us assume that Diesel fuel fed from a gravity tank and atomized by air pres-

(Testimony of Henry Foss.)

sure was lighted by an oil-soaked rag, and is used to get up steam to burn the crude oil in the boiler, and that crude oil is the regular fuel; that it takes 20 to 40 pounds pressure to properly burn the crude oil, and takes 30 minutes or more to get up the steam pressure required to fire on crude oil; let us assume, too, that the boiler is located in an engine room which is approximately 24 by 30, amidships of the barge, and that immediately behind the engine room is a large water tank that goes almost completely [105] across the barge, and that the living quarters are astern from the water tank; in other words, the water tank is between the living quarters and the engine room, and that there is a toilet in the living quarters; that the engine room is entirely enclosed; would a fireman *by* using ordinary care if, three or four minutes after starting the fire, and while it is still burning by this gravity feed Diesel fuel atomized by air from a gasoline-driven engine, if he left and went to the toilet without turning off the Diesel; would that be due care?

A. It would not.

Q. If a person acquainted with the equipment was instructing a new fireman, a fireman of say 15 years' experience, as to where the cocks were, how to utilize them and how to start this particular boiler, how to steam up, should it be necessary for him, the person instructing, to advise the fireman not to leave the vicinity of the boiler while he was steaming up?

(Testimony of Henry Foss.)

A. You say this fireman had had 15 years' experience?

Q. Yes.

A. Why, I should say no. That is his business, his trade. He knows perfectly well how to take care of those things without instruction from the engineer.

Q. Which is the most dangerous period during the firing up or getting up steam ready to use the crude oil, while running on Diesel fuel, is that a more dangerous period? Is fire more likely to occur then, or more likely to occur after it is steamed up and using crude oil?

A. I would say the accidents I have had have always been in the period of building up and getting up steam.

Q. Diesel fuel is more volatile and has a lower flash point than crude oil?

A. Well, it is more dangerous to handle.

Q. It lights easier? A. Yes.

Q. And floors more readily?

A. That is right. [106]

Q. Then of course, you have the hazard of the little gasoline-driven airpump, which wouldn't be as reliable as steam pressure from the boiler, and wouldn't be as steady, would it?

A. Well, that might be debatable.

Mr. Darrah: That is all.

(Testimony of Henry Foss.)

Cross Examination

Mr. Tweedt: Q. Mr. Foss, why should the fireman stand and watch the firebox while he is getting up steam?

A. I don't know as there would be any particular reason why he should particularly watch the firebox. He should remain in the vicinity of the boiler while the steam is being picked up.

Q. Why should he remain in that vicinity?

A. For many reasons. The boiler may drop a soft plug; the fire may go out for different reasons; there may be different foreign substances in the oils that would cause an explosion and the fire may go out entirely and pre-ignite and cause explosions in the fire room.

Q. The things you have just mentioned are just as apt to happen after the boiler has been fired up for hours? A. No.

Q. Why not?

A. It has never been my experience. I can't say it wouldn't happen. It has never been my experience to have any explosions take place, only from gas or something igniting after the fire had been shut down, causing gas to form and pre-ignition, which don't take place after your boiler is up under working conditions; you have a steady flow of fire in there.

Q. You have a steady flow of fire and the heat is more intense than when you first fire up, and therefore generates more gas?

(Testimony of Henry Foss.)

A. Under certain conditions.

Q. If a fireman is 30 or 40 feet away, he is within a safe distance, isn't he?

A. If he is where he can see what is going on, he is. [107] If he is 30 or 40 feet away in another building, he is not.

Q. If the man is on deck and hears an explosion 30 or 40 feet away, and gets immediately to the boiler room, would you say he was in a proper position? A. It is a good place to get.

Q. All of the equipment on these derrick barges is entirely different, isn't it?

A. I don't think you will find any two of them similar.

Q. This particular boiler was an old logging boiler, designed to burn wood?

A. I think they are all more or less the same type, and you make changes in the box if you want to burn oil.

Q. There were only two of these, built by the Willamette Iron Works. Mr. Foss, have you ever seen this boiler?

A. An upright tubular boiler, aren't they, with so many feet of firebox space, all similar, with deviations of measurement only.

Q. What are the duties of a fireman?

A. Work under the direction and supervision of the engineer, and he takes care of his boilers.

Q. He oils the winches?

A. If that is his instruction; yes.

(Testimony of Henry Foss.)

Q. And the drums?

A. If so instructed by the engineer. Some engineers don't care for them to do it.

Q. You are familiar with what the engineer does in his daily tasks? A. I am.

Q. A great part of the time is spent away from the boiler, in fact, the majority of time is spent away from the boiler?

A. I wouldn't say so; it depends on the type of rig; with some rigs it would be impossible to spend but very little time out of the boiler room.

Q. After the steam is up there isn't anything to do, is there, at the firebox?

A. I wouldn't think he would operate very long if he was not there to keep fire in the box and keep water in [108] the tank.

Q. The oil flows steadily? A. Yes.

Q. There is a water line from the tank to the boiler? A. Usually an injector.

Q. There is a gauge? A. Yes.

Q. Every so often the fireman looks at the gauge? A. Right.

Q. There is nothing to do at the firebox outside of that?

A. Maintain the head of steam and keep a proper amount of water in that boiler.

Q. Under the rules of your union, the duties of the fireman are stated?

A. I didn't get that question.

(Testimony of Henry Foss.)

Q. You stated you were business representative of Local 3 of the Operating Engineers.

A. I am one of them.

Q. The union rules state the duties of a fireman, do they not?

A. The duties of a fireman are voted by the union, what he is supposed to do, right.

Q. Those duties include the oiling and greasing of all the equipment on the barge, do they not?

A. It says he shall work under the supervision and direction of the engineer.

Q. It is customary, too, isn't it, Mr. Foss, on these derrick barges where you have Scotch boilers, for the fireman to arrive ahead of everybody else and get up steam in the boiler?

A. It would depend on your instructions from your employer.

Q. In your experience, you don't bring a crew down to stand idle while steam is being got up?

A. The majority of times, yes. There is plenty for the engineer to be doing while the fireman is getting up steam.

Q. Why is the use of Diesel more dangerous than crude?

A. Well, on account of it is more fluid. It is more explosive than crude. Crude is more easy to handle. [109]

Q. Diesel is used for the purpose of getting up steam on very few boilers you are familiar with?

A. Mostly on account of cold weather and the

(Testimony of Henry Foss.)

like of that; crude gets very cold. Your object is to get something there you can handle without a great deal of trouble.

Q. And if the fuel oil stops flowing, whether it be crude or Diesel, you are apt to have an explosion or backfire, aren't you?

A. None whatever, unless it should come on again.

Q. Is there any difference between Diesel and crude in that respect?

A. I wouldn't think there would be. I have never found it so.

Q. You have had backfire on boilers, I presume?

A. Many of them.

Q. Operating on crude? A. Yes.

Mr. Tweedt: I think that is all.

Redirect Examination

Mr. Darrah: Q. When you had those backfires, were you in attendance on those fires?

A. I was.

Q. Was there any harm from them?

A. I had my eyebrows and hair pretty well burned off, and my face blistered up.

Q. Have you ever lost any equipment?

A. I never lost any equipment under my supervision.

Q. Is it the responsibility of the fireman to acquaint himself with the location of the fire-fighting apparatus? A. Certainly.

(Testimony of Henry Foss.)

Q. Isn't it a fact that normally the crude oil is pumped into your firebox, rather than fed by gravity?

A. In some cases, some installations are under pressure, some by gravity. They vary. It depends on the economical situation. It depends on the condition you are working under.

Q. One fed by steam pressure, a pump, that is, a steam pump from [110] the same boiler would be safer than if that was gravity feed, would it not, because if the steam went off, so would the fuel?

A. That would be debatable.

Mr. Darrah: That is all.

The Witness: May I be excused entirely?

Mr. Darrah: Is that all right, Mr. Tweedt?

Mr. Tweedt: Unless the Court wants him.

Mr. Darrah: O.K. I would like at this time to offer in evidence the deposition of Adrian Westall. Will it be stipulated, Mr. Tweedt, that this is the deposition of Adrian Westall, taken at a time when you and I were both in attendance, and may be received in evidence?

Mr. Tweedt: It was returned by the notary, I believe, wasn't it, to the Court?

Mr. Darrah: Yes. I haven't seen it, here, before now.

“In the United States District Court in and for the Northern District of California, Southern Division. Stockton Sand and Crushed Rock Company, Inc., a corporation, Libelant, No.

(Testimony of Henry Foss.)

23686-R, v. John R. Bundensen, Howard F. Lauritzen, Bundensen and Lauritzen, and so forth, Respondents. Deposition of Adrian A. Westall, Taken on behalf of the Libelant, before M. A. Clark, Notary Public in and for the County of Los Angeles, State of California, on Saturday, the 12th day of June, 1943, at 614 Pacific Avenue, San Pedro, California, pursuant to stipulation hereto attached."

This deposition was taken by us of Adrian Westall, employee of the Respondents, as a hostile witness.

(Mr. Darrah then proceeded with the reading of the deposition up to a certain point, at which he interrupted the reading and made the following statement:)

Mr. Darrah: At this time we return the exhibits which Mr. [111] Tweedt was kind enough to stipulate that I withdraw for safe keeping until this time; and the exhibits are also offered in evidence with the deposition.

(Mr. Darrah thereupon proceeded further with the reading of the deposition and completed the reading of the direct examination contained therein.)

The Court: We will take a recess for a few minutes.

(Recess.)

(Testimony of Henry Foss.)

(Mr. Darrah thereupon completed the reading of the deposition.)

Mr. Darrah: Then follows the stipulation in the usual form. It will not be necessary to read that stipulation, Mr. Tweedt?

Mr. Tweedt: If your Honor please, in connection with this deposition Mr. Darrah made the statement that it was taken with Mr. Westall as a hostile witness. That statement was not made at the opening of the deposition. It is not contained in the stipulation and there is no basis to support it in the deposition. Mr. Westall, who is stationed on Catalina, and not available on subpoena, came over voluntarily, and I doubt very much if he could be called under the circumstances a hostile witness.

Mr. Darrah: He came to an office you arranged for.

Mr. Tweedt: I wouldn't expect you not to criticize me for procuring for you an office in which to take the deposition.

Mr. Darrah: I think the deposition speaks for itself.

RALPH LEDINGHAM FOY,

a witness called on behalf of libelant; sworn.

The Clerk: Q. State your name, please?

A. Ralph Ledingham—L-e-d-i-n-g-h-a-m—Foy.

Mr. Darrah: Q. You are an officer of the Stock-

(Testimony of Ralph Ledingham Foy.)

ton Sand and [112] Crushed Rock Company, a corporation? A. I am.

Q. And you were such officer the first part of May, 1941? A. I was.

Q. Ever since have been and now are?

A. Yes.

Q. And "Foy Barge No. 2" is owned by Stockton Sand and Crushed Rock Company, and was, say May 1, 1941? A. Yes.

Q. And at the time in question when the loss occurred, will you describe for us, if you will, the "Foy Derrick Barge No. 2," how long it was, and how wide?

A. It was around 137 feet long and 36 or 38 feet wide. I am not sure exactly now. It had a cabin on, and living quarters on the stern, and a cabin over the engine house, and a rig, derrick A frame and boom.

Q. Could you take a piece of chalk and draw a diagram on the blackboard as you describe it?

The Court: A diagram of what?

Mr. Darrah: A diagram of the barge.

The Court: Aside from the dimensions of it and the pictures here, could he improve on that?

Mr. Darrah: The pictures were taken after the fire.

The Court: Well, you have the dimensions of the barge.

Mr. Darrah: I thought maybe the location of the various things would be helpful.

(Testimony of Ralph Ledingham Foy.)

The Court: There is no dispute as to what there was on the barge and the location, is there?

Mr. Tweedt: Not so far as I know, your Honor, with the exception of the fire extinguishers.

Mr. Darrah: Q. Approximately what was the size of the engine room, about 24 by 30, was it?

A. Around that, 24 or 25 by 30, 32.

Q. What was the location of the engine room?

A. Just about [113] midship, little bit astern of midship.

Q. Was the longest dimension of the engine room crosswise or lengthwise? A. Lengthwise.

Q. What was in the engine room?

A. Boiler, large steam hoist, a swinging engine, air compressor, oil pumps, air tank, tools, and the stern end of the house, itself, was a large water tank that ran clear across the barge.

Q. How high was it above the deck?

A. Oh, it stood about nine feet, between eight and nine feet.

Q. How far from the edge of the deck did it come on each side? A. Around four feet.

Q. And then what was aft the water tank?

A. There was a space of *about feet* and then we had a steam double action winch, which took up about four or five feet. Then there was oil tanks; there was two oil tanks for the fuel oil, which set astern of that. The oil tanks was—one tank was around, oh, about 6 by 6, and the other tank was a long tank, about a 4-foot cylinder type tank, around 15 or 20 feet long.

(Testimony of Ralph Ledingham Foy.)

Q. And where was the toilet located?

A. Just aft of these oil tanks, there was living quarters and a kitchen. The house was located approximately amidship, right on the stern end of the barge; it had a double deck; in other words, it had a living room or dining room downstairs, and upstairs for a bedroom, and it was in the after part of this living room downstairs where the toilet was.

Q. Now, were there fire extinguishers, fire equipment, aboard the "Foy No. 2" at this time on May 15, 1941?

A. Yes; there was.

Q. Was there a steam hose on it for fighting fire?

A. Yes; there was a steam hose.

Q. A sandbox?

A. A sandbox. [114]

Q. What kind of fire extinguishers were there?

A. One Pyrene on the cabin, and one Pyrene on the door looking from the stern to the bow, on the right-hand door, and one 2½-gallon tank straight opposite on the other door.

Q. The 2½-gallon tank was a soda and acid fire extinguisher?

A. Yes.

Q. Will you tell us about this Diesel fuel tank? Where was it; how far from the boiler was the Diesel fuel tank you used to generate?

A. Well, from the front of the firebox it was, oh, approximately six or seven feet; not over eight.

Q. And how was it connected to the firebox?

A. There was around a 10-gallon drum; had a pipe connection out of the bottom of the drum, and a valve, and a piece of hose about two or maybe

(Testimony of Ralph Ledingham Foy.)

two and one-half feet long, then connected onto another piece of pipe that run back down into the burner in front of the firebox.

Q. What kind of a piece of hose was that?

A. A piece of steam hose.

Q. Was this all inside the engine room?

A. Everything, yes; the tank and the hose and the pipe.

Q. Did you see Adrian Westall, on or about May 14, 1941, down there on the barge?

A. I believe that was the date that I saw him.

Q. And to refresh your recollection, May 15 was the day you towed it over; was it the next day after?

A. Yes; the next day after we towed it over.

Q. Will you tell us just what conversation you had with Adrian Westall, what instruction or what-not you had with him respecting the barge at that time?

A. Well, on all boilers—a fireman knows how to fire a boiler, but it is a lot of help if there is somebody there that has been used to firing that boiler, to show him the different valves, so he don't have to hunt for them.

Q. You have fired the boilers on these different pieces of equip- [115] ment for a number of years?

A. Yes; I have.

Q. For how long? A. Since I was 16.

Q. And you have had a great deal of experience around boilers?

A. The first boilers I was on, I was about 16.

(Testimony of Ralph Ledingham Foy.)

Then we haven't had any boilers until around six or seven years ago.

Q. How old are you now? A. 38.

Q. All right, go ahead and tell us about your conversation with Westall.

A. I just showed him the different valves around, and the air compressor, just to help him out so he wouldn't have to try to locate 'em and make it easier for him.

Q. When did you get there that morning?

A. I stayed on the barge all night.

Q. And had you fired up before he got there that morning?

A. I started steam around four o'clock in the morning, and we had a full head of steam when he arrived.

Q. What time did he arrive?

A. Somewhere around 5:30 or 6:00 o'clock. I am not sure exactly. It was just after daylight.

Q. Did he identify himself when he came, or did somebody introduce you to him?

A. Well, I talked to the operator, that is, the engineer, and then I talked to—he told me the other fellow was firing, and I went down. He did not introduce himself, but he took charge of the boiler then. That is when I told him where the valves were.

Q. Did you tell anyone else of Bundensen and Lauritzen's men as to how the thing was operated at or about that time, the day before, or during the day?

(Testimony of Ralph Ledingham Foy.)

A. I wouldn't say for sure. It seems to me that there was a gentleman down there—I forget his name—was on the job when we pulled it in. I may have told him and I may not. I wouldn't swear to it.

Q. Was anything said to Westall about—did he ask any questions [116] about the manner of firing up that boiler?

A. Well, the only thing is that as soon as he found out where the valves was, he said, "I know how to take care of the rest of it." I think he was a competent man.

Q. Did you employ Westall? A. No.

Q. Or Williams? A. No.

Q. Was there anyone else in your organization besides yourself and your father who did employ people? A. No.

Q. Now, among other equipment, besides the things you have mentioned, was there not a bilge pump on the boat, on the barge?

A. Would you repeat that?

Q. Was there not a bilge pump; was there a bilge pump on the boat?

A. There was a gasoline engine, about a 1½-inch gasoline drive engine on the stern of the barge, used for pumping out the barge of accumulated water.

Q. Was that ever used for any other purpose than pumping the bilge?

A. When we was up the river in fresh water, we used to pump water with it into our tanks.

(Testimony of Ralph Ledingham Foy.)

Q. Was there any pretense of its being fire-fighting equipment? A. No.

Q. Were there buckets aboard? A. Yes.

Q. And lines? A. Plenty of lines.

Q. In your experience, is it more dangerous to leave a fire while you are generating steam than it is after the steam is up?

A. When you fire a boiler first your boiler is more liable to go out, because you haven't got the heat to help it along, and if—after your boiler is fired, why, as soon as your oil hits the hot box it is more liable to keep going. In other words, when you first start your fire your bricks are cold, and if you don't get a steady flow she is liable to drop out and not keep [117] going.

Q. Would a fireman using due caution leave the immediate vicinity of the boiler or firebox while he was generating steam to get started on?

A. No.

Q. Now, I would like you to be just a little bit more specific about the location of those fire extinguishers. Take, for instance, the soda and acid 2½-gallon fire extinguisher; will you describe just where it was located in the engine room?

A. In the engine room just above the steam oil pump.

Q. Where with reference to the doors?

A. Right alongside the door, just as you walked inside.

Q. Just inside the starboard or port door, or are they that way?

(Testimony of Ralph Ledingham Foy.)

A. Left is port, isn't it?

Q. Were the doors right and left, or were they front and back on that engine room?

A. On the side.

Q. On the right-hand side and on the left-hand side?

A. On the left-hand side looking forward on the barge was the soda and acid, and on the right-hand side was the Pyrene.

Q. As you went out, take first the left-hand side, was it on the right- or left-hand side of the door as you went out?

A. Standing in front of the firebox, looking forward on the barge, if you turned you would be on the left-hand side going out.

Q. Going out the left-hand door, it would be on the left-hand side of the door?

A. That is right.

Q. How about the one on the right-hand side?

A. Just the opposite.

Q. How do the doors swing, in or out?

A. Out.

Q. Do they swing on the side the fire extinguisher was on, or on the other side? Do you remember that?

A. The door was hung on the forward side, and the fire extinguishers were on the aft side of the door. [118]

Q. Was that true in each instance?

A. Was that what?

(Testimony of Ralph Ledingham Foy.)

Q. Was that true in each instance as to the fire extinguishers, both the right door and the left door?

A. Yes.

Q. Where was the steam hose?

A. We had the steam hose laying on the left-hand side of the engine, looking forward, just about seven or eight feet from the front of that firebox.

Q. Where was the sand box?

A. The sand box was right alongside the oil pump that pumped the oil for the fuel oil.

The Court: What do you use the steam hose for?

The Witness: Blowing out flues, cleaning your engine off.

Mr. Darrah: Q. Oh, what was Orville Foy's position in the Stockton Sand and Crushed Rock Company?

A. Bookkeeper.

Q. Did he have authority to make contracts?

A. No.

Mr. Darrah: That is all.

The Court: Will you get through with this witness today?

Mr. Tweedt: I think it will take twenty minutes or half an hour, your Honor.

The Court: Well, we will take an adjournment until ten o'clock tomorrow morning. We wouldn't be able to get through with this case in any event this evening.

Mr. Tweedt: I don't think so, your Honor.

Mr. Darrah: This is our last witness.

Mr. Tweedt: This is their last witness, apparently, but we haven't started our case.

(Testimony of Ralph Ledingham Foy.)

(Thereupon an adjournment was taken until tomorrow, Friday, July 23, 1943, at 10:00 o'clock a. m.) [119]

Friday, July 23, 1943, 10:25 O'clock A. M.

RALPH LEDINGHAM FOY,

recalled.

Mr. Darrah: May it please the Court, although I announced that that was all at the end of the day yesterday, I have two or three more questions I would like to ask Mr. Foy.

The Court: Proceed.

Direct Examination

(resumed)

Mr. Darrah: Q. Mr. Foy, the method of firing this particular boiler was one that was used by other vessels, was it?

A. Yes; a number of vessels in the bay are fired that way.

Q. Is there anything inherently unsafe about that method? A. Nothing at all.

Q. What is the advantage of that method over using coal or wood, that has been referred to?

A. It is a quicker method, and a lot cleaner, and a lot less work for the men operating the rig.

Q. Do you remember a conversation had with Mr. Westall that has been referred to in his deposition, in 1941, in June, I believe it was, when Mr. Westall, yourself, Mr. Ellis and myself, went down

(Testimony of Ralph Ledingham Foy.)

aboard this barge shortly after the fire? Do you remember that occasion?

A. Yes; I remember the occasion, and at that time Mr. Westall admitted it was negligence on his part.

Q. Was it not a fact that at that time Mr. Westall stated that it was negligence on his part to leave the fire, that it was not good practice, and also that he did not—that in his excitement he forgot to use the fire extinguishers that were there?

A. That is right.

Mr. Tweedt: That is objected to on the ground it calls for hearsay and also calls for a conclusion of the witness. Apparently [120] he seeks to impeach their own witness. Certainly it is a compound question. If he answered, I wouldn't know.

The Court: Did you take his deposition?

Mr. Darrah: We took Mr. Westall's deposition, and in the deposition laid the foundation for this impeachment. On page 28—this is after referring to the time and place, he said he remembered the circumstances:

“Q. And you didn't say either that you had learned that there was a Pyrene fire extinguisher available, but forgot about it in the excitement, and you didn't say it was just carelessness on your part, did you?

A. Well, no fire extinguisher was ever pointed out to me.

(Testimony of Ralph Ledingham Foy.)

Q. No. I am asking you did you say this?

A. No.

Q. You didn't say that? A. No."

Mr. Darrah: We previously reminded him of the particular time and circumstances, which he said he remembered, but he denied the conversation.

The Court: This is to impeach that testimony?

Mr. Darrah: Yes.

The Court: I will limit it to that.

Mr. Tweedt: I also object to the question, if your Honor please, on the ground it is leading. I don't think I ever heard any more leading question.

Mr. Darrah: All right, I will withdraw the question and ask that the answer go out, and let the witness testify to the conversation.

The Court: Proceed.

Mr. Darrah: If that will meet counsel's objection.

Q. Then, Mr. Foy, will you give us the conversation to the best [121] of your recollection with respect to those two points with Mr. Westall on that occasion?

A. On this day, a short time after the barge had burned, Mr. Ellis, Mr. Darrah, and myself and Mr. Westall went over to the right, and walking over it and inspecting it, he admitted to us——

Q. Just what did he say?

The Court: State the conversation, who was present, state it in the exact words. That is calling for your conclusion.

(Testimony of Ralph Ledingham Foy.)

The Witness: He said it was negligence on his part to go away and leave the fire at that time.

Mr. Darrah: Q. What, if anything, did he say about the fire extinguishers?

A. He said that he did not use the fire extinguishers, but that he used a coat or overalls to try to extinguish the blaze.

Q. Is there anything more you recollect about that conversation respecting the fire extinguishers? Did he say why he didn't use them?

A. Not that I can recollect.

Q. Now, just what did you tell or show Westall respecting the greasing, turning down the grease cups, on the occasion on the 16th you have already testified to, 16th of May, 1941?

A. I don't know exactly how to answer that. Maybe—could I tell you how to do it?

Q. Well, all right, if that is the way you told him.

The Court: If that is what happened there.

Mr. Darrah: Q. Tell us just what you told him.

A. Well, I first showed him the valves and things, how to fix, get steam and operate the air compressor, and at that time, after your fire is going, it is not—it is just according to who is operating the rig and how many men they have on board, what the fireman's duties are. On this rig, when we are operating it [122] ourselves, we carry a fireman and an operator and a deck hand. The deck hand

(Testimony of Ralph Ledingham Foy.)

takes care of the outside oiling, and the fireman takes care of the fire room. In the fire room the fireman's duties are to grease his steam engine and his swinging engine.

Q. Is this what you told Mr. Westall on that occasion?

The Court: The testimony we are trying to develop is, what did you do when this man came on there, with relation to showing him *him* what to do, and what did you say to him?

The Witness: I told him, after telling him about the starting and firing, to grease up the pistons and the bearings in the engine room; and there are a few sheaves on the bull wheel just outside the engine room that have to be greased up, but all this can be done or should be done while in the engine room, while they are first steaming. After the oil is turned on and your gas engine is turned off, there is no noise inside the engine room except the burning of the fuel, and your outside operations for greasing are taken care of at that time.

Mr. Darrah: Q. That is, outside operations you speak of, the grease cups on the turntable or bull wheel. Are there openings in the engine house which permit a person to see in while he is greasing those?

A. There is a door on the left-hand side of the front of the house, and also the opening of about 6 by 4 width in the center of the front of the house, where the cables lead out from the drums of the winches, to go through the bull wheel and turntable

(Testimony of Ralph Ledingham Foy.)

for the running of the derrick, which are open, and you can see back into the engine room.

Q. Generally, is the engine room a little darker than the outside? A. Directly, at all times.

Q. Were the greasing operations that you called Mr. Westall's attention to in the engine room and on the turntable; is that [123] correct?

A. That is right.

Q. Now, as to those in the engine room, can he observe whether the fire is on or off at all times when he is in the engine room?

A. You are not more than ten or twelve feet away at any time.

Q. From your firebox? A. Right.

Q. And the others are in sight of the firebox; is that correct? A. Right.

Q. And even though you cannot be looking necessarily directly into the firebox from the rear of it, can you in the room tell whether the fire is burning, or not? A. There is always a glow.

Q. Always a glow from the fire against the engine room wall; is that what you mean?

A. That is right.

Q. Will you tell is just how far a person would have to walk from the firebox around to the toilet on there? A. Between 50 and 55 feet.

Q. And will you describe the course where you would have to go?

A. Well, the barge is 38 feet wide or 36, I have forgotten what the testimony was—36, I guess it is.

(Testimony of Ralph Ledingham Foy.)

The boiler sits in the center of the derrick barge. You would have to walk within two feet of one side, either side he wanted to go.

Q. Why?

A. To get out the door and around the cabin and around the large water tank that is set just astern of the cabin.

Q. When you say cabin, you mean engine room?

A. Engine room, yes. That would be approximately 15 or 16 feet to the edge of the barge or the walkway of the barge, where he would walk by. He would turn half and go around 12 feet, 12 or 15 feet, which was the base of the large water tank. There was about a six-foot opening space through the barge. The anchor winch took up around 4 feet. The oil tanks took up another 6 feet. That would leave him at the stern of the barge, and turning right to go into the door, he [124] would have to proceed about 4 feet across, past midship of the barge, to get where the toilet was, and the toilet was an overhang off the stern of the barge.

Q. Now, what was the condition of the barge, as far as its machinery, equipment, hull, and so forth was concerned, at the time you saw it on the 16th of May, 1941?

A. The machinery, the boiler, all operating parts of the barge was in first class shape.

Q. Would you say she was seaworthy throughout?

A. It was passed by the Board of Underwriters for insurance just a short time before that.

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt: If your Honor please, we move to strike that out. It is not responsive to the question, and is incompetent, irrelevant, and immaterial. What an underwriter insures is certainly his business. Whether it is seaworthy or unseaworthy has nothing to do with it.

Mr. Darrah: Q. Just answer "Yes" or "No," Mr. Foy. I will withdraw it. A. Yes.

Q. How long prior to the fire had the boilers been inspected or tested, inspected and tested?

A. They were tested within a year.

Q. Within a year prior to the fire?

A. We re-tubed the boilers.

Q. How was the "Foy No. 1" fired?

A. "Foy No. 1" was not fired. It was Diesel driven.

Q. There was some testimony that Bundensen and Lauritzen had employed the "Foy No. 1" just prior to this time. Was your crew aboard at that time? A. That is right.

Q. That was a bill for services; is that correct?

A. Yes.

Mr. Darrah: I think that is all—just one further point; pardon me, Mr. Tweedt.

Q. Were there turn-off valves between the fuel oil tanks and the burners?

A. There was turn-off valves at the base of the [125] 10-gallon tank that contained the Diesel oil, and also another shut-off just at the front of the boilers.

(Testimony of Ralph Ledingham Foy.)

Cross Examination

Mr. Tweedt: Q. Mr. Foy, did you go up to Vallejo from Oakland on the "Foy No. 2" on May 15?

A. No, I did not.

Q. Who was on the barge when she was taken up?

A. My brother went up with the towboat crew.

Q. When did you arrive on the barge?

A. I arrived the evening before the boiler was first fired up for the Bundensen and Lauritzen job.

Q. In the evening, about what time?

A. It was around four o'clock or something, I don't know; it might be a little later than that. It was still daylight.

Q. Was your father with you? A. No, sir.

Q. Did he come up later? A. No.

Q. He was not up there that evening at all?

A. Not to my recollection at all.

Q. Did you talk to Mr. Kitchen when the barge arrived at the Bundensen and Lauritzen job?

A. I did.

The Court: Who is the fireman? What is his name?

Mr. Tweedt: Westall was the fireman.

The Court: Who was Kitchen?

Mr. Tweedt: Mr. Kitchen is the superintendent for Bundensen and Lauritzen on the job.

The Witness: Mr. Kitchen is the gentleman sitting back there (indicating).

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt: Q. That is the gentleman sitting in the courtroom here, that you talked to?

A. That is it.

Q. Who else was present when you had the conversation with Mr. Kitchen?

A. My brother-in-law, Mr. Veach, who is in the armed [126] service now. I don't recollect anybody in particular except the crew on the tug and my brother.

Q. Mr. Veach was your regular fireman, was he?

A. He was the regular fireman on the barge when we was firing it, and also my helper on another derrick barge.

Q. Please state for us the conversation you had with Mr. Kitchen at that time.

A. Well, I don't recollect any——

The Court: Well, did you say "Hello" to him?

A. Sure.

The Court: All right, start from there.

Mr. Tweedt: Q. Did you have a discussion about the crew of the "Foy No. 2"?

A. No. Mr. Kitchen was there at the job when I arrived, if I am correct, and we pulled in with the derrick barge and——

The Court: There was nothing said up to this time? What was the first thing you recall that was said, if anything? Didn't you even greet each other or anything?

The Witness: Well, we said "Hello."

(Testimony of Ralph Ledingham Foy.)

The Court: All right, from there on.

The Witness: And I stayed with the rig and helped Mr. Kitchen there to run lines, this being on a mud flat, to run lines to get the barge into the dock.

The Court: But he wants the conversation. He wants to know what was said and done at that time and place, and who was present.

The Witness: I cannot recollect anything that was exactly said.

The Court: As near as you can remember; you don't need to be so exact about it, but just the conversation.

The Witness: I told him that I would stay with the rig—is that what you want? [127]

The Court: No matter what he wants or not; you just tell us the conversation. Don't concern yourself about him or what he wants, at all.

The Witness: I told him I would stay and fire up the rig and show the new men coming on the job the particulars about the operation of the barge.

Mr. Tweedt: Q. Did you tell him you had to go on another job and couldn't stay there and operate "Foy No. 2" on the job for him?

A. That is right.

Q. Did you tell him they would have to get another crew?

A. We never expected to—yes; I told him we would not be able to furnish a crew.

Q. Did you tell him to get the crew for you?

(Testimony of Ralph Ledingham Foy.)

A. No; I did not tell him to get the crew for me.

Q. That you would pay the wages of the crew?

A. Not to my recollection.

Q. Did Mr. Veach stay with you on the barge over night?

A. That is right.

Q. And he helped fire up?

A. That is right.

Q. The next morning there did he help show Westall and Williams the work on the barge?

A. I left Mr. Veach there to acquaint the men that were stepping onto a rig they had never operated before, to help them to acquaint themselves with the operation of the rig.

Q. When the "Foy No. 2" arrived up at this job, Mr. Veach was expected to stay on the barge and fire, wasn't he, while she was there?

A. Not to my recollection. I was working on another job, and I went down there in the night, and didn't get but about three or four hours sleep, and had to be back up on a job at Rio Vista about eight o'clock. [128]

Q. Did Mr. Kitchen object to you and Mr. Veach leaving the barge?

A. Not to my recollection.

Q. Did he tell you it would be difficult to get a crew to put on that barge who were familiar with it?

A. Not to my recollection.

Q. Did you tell them that they had nothing to worry about in getting another crew, the barge was fully insured, and it was your risk?

A. No; I did not.

(Testimony of Ralph Ledingham Foy.)

Q. Now, after you had shown Mr. Westall how to operate the "Foy No. 2," you told Mr. Kitchen, did you, that you were satisfied Westall knew how to operate the barge?

A. I do not recall those exact words.

The Court: As near as you can remember, say what was said about it.

Mr. Tweedt: Q. Did you say anything?

A. No; not to my recollection, I did not.

Q. The "Foy No. 2" is a very old barge, or was a very old barge at that time, wasn't it, Mr. Foy?

A. I do not know the exact age of the barge. It is according to what care is taken of a barge, what you would call an old barge.

The Court: You don't know the life of this barge?

The Witness: The life of a barge will run——

The Court This barge.

The Witness: No; I don't know.

The Court Was it 20 years?

The Witness: It was older than that. It must have been between 20 and 30 years old. I wouldn't swear to anything on it as to the exact age of it.

Mr. Tweedt Q. She leaked very badly, did she not?

A. As barges leak, which most of them do, she did not leak as bad as lots of them do, and if any leaks were caused from the barge at [129] this time, which you were trying to claim, it was done by lay-

(Testimony of Ralph Ledingham Foy.)

ing on a mud flat on the operation of the Bundensen and Lauritzen job.

Q. You put her on the mud flat?

A. At the direction of Mr. Kitchen, the barge was pulled in.

Q. By the Foy tug? A. Right.

Q. You knew exactly the type of work that she would be required to do, and where she would be required to lay? A. Right.

Q. You had the "Foy No. 1" up there previously? A. Right.

Q. And you were familiar with the type of work? A. Right.

Q. I think you stated the "Foy No. 2" was 137 feet long.

A. To the best of my recollection, it is.

Q. How far would you say that it is from the firebox to the stern of the barge?

A. In a direct line?

Q. Yes.

The Court: About 30 feet.

The Witness: No; it was a little over that. It must have been around 40—the fire engine room door was astern amidships, approximately 45 or 40 feet.

Q. The firebox then is not located approximately admidship on the barge, is it? A. No.

Q. It is well aft?

A. Not well aft; aft of center.

Q. You were on the barge after the fire, were you not, Mr. Foy? A. Yes, sir.

Q. Will you look at these pictures and tell me

(Testimony of Ralph Ledingham Foy.)

if that is the way the vessel looked after the fire (handing pictures to witness)?

A. Yes; it looks like it.

Mr. Tweedt: If your Honor please, the pictures that are in evidence I would like to supplement with these, because they show the barge a little better, I believe, in its entire length. [130]

The Court: Very well.

Mr. Tweedt: I would like to offer these in evidence as Respondents' Exhibits next in order.

(The photographs were marked, respectively, Respondents' Exhibit F and G.)

Mr. Darrah: I understood they were all in evidence. Weren't they all in evidence?

Mr. Tweedt: These are different pictures, Mr. Darrah, than you have.

Mr. Darrah: Then may I see them? Is this before or after the fire?

Mr. Tweedt: If you can't tell from the barge, it must have been in pretty bad shape, Mr. Darrah.

Q. Mr. Foy, on these exhibits, Respondents' Exhibits F and G, this stack on Exhibit G that appears in the center of the picture, that is the boiler we have been talking about? A. That is right.

Q. And as we look at this picture the firebox is on the after side of that boiler?

A. That is right.

Q. And in Respondents' Exhibit F the house that appears on the aft end of the barge is it lies in that picture is the crew's quarters?

(Testimony of Ralph Ledingham Foy.)

A. That is right.

Q. And again the stack appearing in the center of the picture is the boiler?

A. That is right.

Q. And the distance from the boiler and the fire-box to the crew's quarters was approximately, you say, 40 feet?

A. To the stern of the barge.

Q. It is a little shorter than that to the entrance to the crew's quarters?

A. That is right.

Q. Now, Mr. Foy, anyone on the stern of the barge could see the stack over the water tank, could he not?

A. If he was outside the [131] cabin.

Q. Any place on the barge, you could see the stack of the boiler, could you not?

A. Not in front around the bull wheel.

Q. You could see it from the side of the front, from either corner of the barge?

A. Not unless you were standing toward the bow corner, either bow corner.

Q. But between the crew's quarters and the boiler stack there was no obstruction except the water tank?

A. That is right, if you are outside the house.

Q. Any experienced fireman can tell, can he not, from the smoke coming out of the stack, what is going on inside the firebox?

A. That is providing he is looking at it.

Q. Yes. This steam line that you spoke of on the barge, you regard that as being fire equipment?

A. No. It could be used as fire equipment if you had steam.

(Testimony of Ralph Ledingham Foy.)

Q. But you would have to have steam in order to use it? A. That is right.

Q. This barge had no pump available for fighting fire? A. No; there is not.

Q. The fire extinguishers that you referred to were in the fire room, were hanging on the forward side of the doors leading into the fireroom?

A. They were hanging on the after side of the door jamb.

Q. The after side of the door jamb?

A. The door swung this way (indicating) and the fire extinguishers were just inside, the wall on the inside of the cabin.

Q. The door swung to the stern?

A. To the bow.

Q. To the bow? A. Yes.

Q. And the extinguishers hung on the after side of the door? A. That is right. [132]

Q. You stated yesterday, Mr. Foy, that a boiler fire is more apt to go out when you are first heating up; that is correct? A. That is right.

Q. And by the same taken it is true, is it not, that there is less danger of any fire occurring if the fuel continues to flow after the fire has gone out, when you are first firing up?

A. Will you repeat that, please?

Q. Let us assume that the fire goes out when you are first steaming up. A. Yes.

Q. And thereafter the fuel starts to flow again.

A. Yes.

(Testimony of Ralph Ledingham Foy.)

Q. There is less danger of fire, of that fuel igniting under those circumstances than there would be if the firebox had been operating for an hour or two hours or three hours?

A. That is according to how long before the fire goes out. If the fire goes out before your bricks are hot, there is less chance for any of it, but if your fire has been running long enough to heat up your bricks and goes out, the oil will ignite itself.

Q. Then it is also true, if on this occasion the oil did stop flowing and it started to flow again and then ignited, the firebox must have been very hot?

A. Not very hot.

Q. It takes considerable heat, does it not, to ignite Diesel oil?

A. No, not to amount to anything, at all, not when you are smouldering on hot brick.

Q. How long does it take to get the bricks hot?

A. All right, we go into this now. The rig was in operation the day before——

Mr. Tweedt: I don't know.

The Witness: May I find out?

Mr. Tweedt: Isn't it a fact that the rig had been laid up a considerable time before you started to take her up to this [133] job?

A. Not a considerable time.

Q. It had been laid up, hadn't it?

A. It had been.

The Court: How long?

(Testimony of Ralph Ledingham Foy.)

The Witness: Oh, a matter of a couple of weeks is my best recollection. May I find if that boiler was steamed up the day before this accident happened?

Mr. Tweedt: I don't know where you can find out.

The Witness: Let us get the report of our work. This depends on whether these bricks were hot the day before, whether they had any heat in the boiler.

The Court: You will get us all warmed up, if you are not careful. We have a method of procedure in court, and you are put on the stand to find out what you know, not what somebody else knows. Proceed.

Mr. Tweedt: Q. How long did it take to heat up the bricks in the firebox?

A. If the boiler is cold and hadn't been in use the day before, it would take anywhere from an hour to an hour and a half, an hour and three-quarters, to get a full head of steam.

Q. I don't mean to get a full head of steam. I mean sufficiently hot enough in your opinion to ignite the fuel.

A. To the most—if the boiler has been fired up the day before, it would approximately take around twenty minutes.

Q. And if the fire had been burning for twenty minutes, Mr. Foy, you would think that the indication from the fact that it had been burning twenty minutes would be that it was operating satisfactorily, wouldn't you?

(Testimony of Ralph Ledingham Foy.)

A. Well, that all depends on whether the boiler was steamed up the day before, or not.

Q. Let us not go into that. We have answered the question on the basis that it was cold. [134]

The Court: You said it would take twenty minutes to heat it up.

The Witness: It would take twenty minutes to heat a full boiler up so that it would ignite its own fuel from the bricks, and a warm boiler maybe it would take five or ten minutes, not over that.

Mr. Tweedt: Q. Now, will you please answer the question that I asked you?

The Court: Read the question, Mr. Reporter.

(The reporter read the question.)

A. Yes.

Mr. Tweedt: Q. And you wouldn't, Mr. Foy, think that a fireman under those circumstances, who went out to the toilet, was negligent, would you?

A. As long as he was on Diesel oil, it is dangerous to leave the fire. He was negligent.

Q. You think it would be dangerous to leave for two minutes?

A. With Diesel oil, yes. May I explain why?

The Court: You may explain the answer if you wish.

The Witness: This engine is operated by an air compressor, and you have a gas engine operating the air, and your Diesel oil flows down from your tank. While that gas engine is running you can not hear the roar of the firebox. After the gas engine is

(Testimony of Ralph Ledingham Foy.)

shut off, then you can hear the roar of the firebox within 150 feet.

Mr. Tweedt: Q. Did you tell Mr. Westall that it was necessary to remain at the firebox and not leave for even a minute or two minutes?

A. I did not.

Q. The necessity that you state for remaining is peculiar to this particular rig, isn't it?

A. Not particular to any rig that is operated with Diesel engine. You can't hear the roar of [135] the fire.

Q. Isn't it a fact that any necessity for the fireman to remain standing in front of the firebox——

A. That is the fireman's duties.

Q. Let me ask the question, please.

Will you read as far as I got, Mr. Reporter, please?

(The reporter read the question.)

Mr. Tweedt: Q. ——depends wholly upon the condition of the equipment of the barge?

A. No.

Q. Do you anticipate daily on your barge that the fuel will stop flowing?

A. There is always a chance of the fuel stopping flowing at any time on any firebox.

Q. Is the situation, Mr. Foy, in your opinion, any different than if I light the gas furnace in my home and then go up and sit down where I can't watch the fire?

A. Yes, it is. You have a continuous flow of gas which is not liquid and not subject to any stoppage, at all.

(Testimony of Ralph Ledingham Foy.)

Q. You have a continuous flow of liquid on your barge, don't you? A. Until you get stoppage.

Q. You don't have stoppage unless you have dirty fuel or a plugged line, or something of that nature, do you?

A. There is lots of things that can happen to your fuel.

Q. Had you examined the fuel line before the barge was taken on the job?

A. I did not examine the fuel line, but I fired up the boiler and it worked perfectly.

Q. That was an indication, if it worked perfectly, that everything was in good order?

A. It may work perfectly this morning; maybe go a month and not get stoppage.

Q. *When* do you get stoppage from?

A. A little piece of rope yarn may get into the fuel tanks, or in pouring in the Diesel oil [136] you may pick up a dirty bucket and may have some dust in it, and pouring the Diesel oil in there you pour the dirt in with it.

Q. In other words, then, Mr. Foy, the reason for standing constantly at the firebox is the condition of the equipment and the fuel?

A. No; it is not; the fireman is hired for the job of watching the fire. He is not hired for standing out on deck.

Q. When you were present, Mr. Foy, on this occasion that you talked to Mr. Westall, did you take a written statement from Mr. Westall?

(Testimony of Ralph Ledingham Foy.)

A. Mr. Westall at one time made a written statement, but I do not recollect whether it was at that time, or not.

Mr. Tweedt: Have you that written statement, Mr. Darrah?

Mr. Darrah: I can say for your benefit, Mr. Tweedt, that none was taken at that time, but one was taken by me from Mr. Westall on a prior occasion, having nothing to do with the incident in question. I have that statement.

Mr. Tweedt: May I see that statement?

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Tweedt: Q. Mr. Foy, on the line leading from the Diesel barrel to the burner there was no strainer, was there? A. No.

Q. Were you present on the morning of May 16th when the barge commenced operating? I mean, after steam was up and they commenced using the winches? A. Yes.

Q. It is a fact, is it not, that the men present had to do three hours of work before they could use the equipment on the barge?

A. I do not know how much time they put in. I was there for about half an hour. It is altogether according to what type of work, how much time they put in rigging the rig up to do a certain job. The rig was in operation with a clamshell on it at the time it went in. [137]

(Testimony of Ralph Ledingham Foy.)

Q. Were you there long enough and did you see that the winches and the lines would not function?

A. No; I did not.

Q. You stated yesterday that Orville Foy was the bookkeeper for the libelant.

A. That is right.

Q. You also stated that he had no authority to make contracts. How was Mr. Orville Foy's authority established? Was there a resolution of the board of directors?

A. No; there was not.

Q. Who established his authority?

A. He did not have any authority.

Q. How was that established?

A. He did not have any authority.

Q. Who told him what he could do or what he could not do?

A. He took care of the books and did odd jobs of checking up, picking up groceries for the boats. There was nobody exactly told him what to do or when to do it.

Q. Was there anybody told him what not to do?

A. It was just according to how far, what things he would do that was in his capacity.

Q. There was no limit fixed expressly on his authority, was there, by the board of directors?

A. No.

Q. He would send out bills on behalf of the libelant, would he not?

A. That is right.

Q. And the libelant accepted the money in payment of those bills?

(Testimony of Ralph Ledingham Foy.)

A. Will you repeat that, please?

(The reporter read the question.)

The Witness: Well, let us get the libelant straight here.

Mr. Tweedt: The libelant is the Stockton—
What is it—Rock and Gravel Company?

A. That is right.

Q. Of which you are the vice-president?

A. That is right.

Q. He sent out the bills for the libelant, did he not?
A. Yes. [138]

Q. And accepted the money in payment for them?

A. That is right; provided the bills were correct.

Q. The bills that have been introduced here in evidence here, this bill that is Respondent's Exhibit C, that was sent out by Orville Foy?

A. That is correct.

Q. Libelant received the money in payment of that and accepted it, did they not?

A. I could not say they did or I could not say they did not. I never seen the check they received. I work on the outside and never had much to do with the bookkeeping part of it.

Q. You had nothing to do with making contracts?
A. I had the power to make contracts.

Q. Who gave you the power?

A. The board.

Q. Who composed the board of directors?

A. My mother and my father and myself are

(Testimony of Ralph Ledingham Foy.)

the officers of the company. What is this \$76 on here (indicating on paper) ?

(Mr. Tweedt handed the witness another document.)

The Witness: It looks like the rig worked the morning before it burned, or the day before it burned, so there must have been heat on those bricks.

Mr. Tweedt: I will move to strike that out.

The Court: It may go out.

Mr. Tweedt: Q. And then I will ask the witness why it appears from this bill, Respondents' Exhibit D, that the equipment worked.

A. The rig was supposed to have been burned up, or did burn up, on the morning of May 21st. Here is the fireman got in 8 hours.

Q. You are speaking of May 20th ?

A. May 20th, they paid the fireman 8 hours at \$1.60, or the engineer 8 hours at \$1.60 and the fireman 8 hours at \$1.10. I guess this is a bill for the [139] men on the job.

Q. The metal pipe that connected with the firebox and connected to the hose that ran to the Diesel fuel barrel ended alongside the boiler, did it not ?

A. That is right.

Q. Before you left the barge on May 15 and May 16, 1941, were the fire extinguishers tested ?

A. Did I ever test—no, I am not supposed to say that—no, they was not.

Q. When were they last tested, to your knowledge ?

(Testimony of Ralph Ledingham Foy.)

A. They was last filled about four months before that time.

Mr. Tweedt: I think that is all.

Mr. Darrah: May I ask one or two further questions?

Redirect Examination

Mr. Darrah: Q. Reference to the itemized statement which you just referred to in your cross-examination by Mr. Tweedt is a statement of Bundensen and Lauritzen showing the time of the fireman and the engineer on this job; is that correct; and referred to as Respondents' Exhibit D?

A. That is correct.

Q. Further calling your attention to Respondents' Exhibits G and F, first taking G, that photograph was taken from what part of the barge?

A. Within four or five feet of the bow, directly standing in the bow of the barge.

Q. Looking toward the stern?

A. Looking toward the stern on the port side.

Q. And that foreshortens the distance further away and makes those in the foreground appear much larger than they are, as for example the position of the boiler as appears in the picture is approximately what with respect to the forward and aft end of the boat?

A. Well, the distance from the bow of this boat to the A frame here is approximately 50, and it don't look like it is 50 feet clear back the whole length of it. [140]

(Testimony of Ralph Ledingham Foy.)

The Court: It is 135 feet altogether, isn't it?

The Witness: 137.

Mr. Darrah: Q. Now, with respect to Exhibit F, which the respondents offered in evidence, is that not likewise foreshortened and taken from the forward position? A. That is right.

Q. Which makes the front part of the barge appear to be much longer?

A. The barge is 36 feet here and 137 there (indicating).

Q. And they appear pretty near the same?

A. They appear pretty near the same distance.

Q. Now, looking at this picture, can you tell me on this picture where the door is that Mr. Westall would have to go through to get to that toilet?

A. That black and white space there is a door, right on the stern of the barge.

Q. That would be——

A. On the starboard stern.

Q. Where would he have to go after going through that door?

A. Go through the house and over in the far corner, another little door in the stern, where the overhang of the toilet is.

Q. On the port side of that deck house?

A. On the port side of the house, there, and from the toilet you cannot see the boiler.

Q. Or the stack? A. Or the stack.

Q. Now, with reference to the fire extinguishers, you said they were fastened one on each side

(Testimony of Ralph Ledingham Foy.)

of the doors leading out of the engine room, as I understand, and on the side of the door, the same side of the door the door was hung on, hinged on; is that correct?

A. Oh, no; the opposite side.

Q. Then there was no opportunity for fire extinguishers to be behind the door?

A. At any time they would not have been behind the door.

Q. These pictures that we just referred to are obviously after the fire, and don't show the deck house or other structures [141] that were burned by the fire?

A. That is right.

Q. Now, you said in your statement or in your cross-examination that you did not tell Adrian Westall to stay in constant attendance upon the fire when he was firing up. Why didn't you?

A. A man who has been firing boilers 10 or 15 years, that is his duties. It is not for somebody to tell him to watch a fire. It is understood.

Q. Did Mr. Westall appear to know his business when you were showing him those things?

A. He did. He appeared to be a capable man.

Mr. Darrah: That is all.

The Court: That is all. Step down.

Mr. Darrah: We are ready to rest. It is understood, of course, that the issue of damage is reserved.

Have we met all of your requirements on the demand to produce? We do want your compensa-

(Testimony of Ralph Ledingham Foy.)

tion records, your payroll records, that we demanded.

Mr. Tweedt: I don't know what records you want, Mr. Darrah, or what you want to clutter up the record with. I am willing to stipulate that Mr. Williams and Mr. Westall were, for the days they worked on the derrick barge, including the day of the fire, carried on the payroll records of Bundensen and Lauritzen, and also declared under their compensation policy. Anything else?

Mr. Darrah: And that their services were procured by Bundensen and Lauritzen; Bundensen and Lauritzen contacted them relative to the employment.

Mr. Tweedt: I would rather let the evidence speak for that than stipulate on it.

Mr. Darrah: Would you stipulate that the effect of this [142] exhibit is that it was operated on the 16th, 19th, 20th, and, of course, the testimony shows it was operated on the 21st.

Mr. Tweedt: That the derrick barge operated?

Mr. Darrah: Yes.

Mr. Tweedt: The derrick barge worked on the Bundensen and Lauritzen job at Vallejo on the 16th, 19th and 20th of May, 1941.

The Court: Call your first witness.

Mr. Darrah: And Westall and Williams were on your payroll.

Mr. Tweedt: That is right.

Mr. Darrah: And operated the barge on those days.

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt. They were the operator and the fireman.

Call Mr. Lauritzen.

HOWARD F. LAURITZEN,

a witness called for the respondent; sworn.

The Clerk: Will you state your name?

A. Howard E. Lauritzen.

Direct Examination

Mr. Tweedt: Q. How old are you, Mr. Lauritzen? A. Forty-seven.

Q. You are one of the respondents in this case?

A. I am.

Q. And you were a partner of Bundensen & Lauritzen. A. I am.

Q. That is a copartnership. What is your occupation? A. General contractor.

Q. How long have you been in that business?

A. Seventeen years. [143]

Q. In May, 1941, were you engaged in a construction job on the Napa River above Vallejo?

A. I was.

Q. Very briefly, what was the nature of that construction job?

A. It was an outfall sewer for the Public Works Department of the United States Navy. There was a new housing project going in, and it was an outfall sewer going across the mud flats.

(Testimony of Howard F. Lauritzen.)

Q. Did Foy No. 2 Derrick Barge do some work on that job? A. She did.

Q. Who arranged for that? A. I did.

Q. Was such arrangement oral or written?

A. Oral.

Q. With whom did you make the arrangement?

A. I made the arrangement with Mr. Foy, Senior.

Q. Did you talk to him personally or by telephone? A. By telephone.

Q. Will you tell us where you called Mr. Foy?

A. I first called—tried to get Mr. Foy at the office in Oakland, and I couldn't get him, so on the 14th I called him at his home—at a telephone number in Stockton which I presumed was his home.

Q. You were familiar with Mr. Foy's voice, were you, then?

A. I was at that time; talked to Mr. Foy several times before.

Q. Was it he that you talked to?

A. It was.

Q. Mr. Lauritzen, I will show you a telephone bill and ask you if that is the telephone bill of Bundensen & Lauritzen for the month of May, long distance calls? A. It is.

Mr. Tweedt: In lieu of putting all these documents in evidence, with the consent of counsel, I would like to read two entries from it only. You may examine it if you want others in subsequently.

[144]

“May 14 Call to Foy, Oakland, .10”

“May 15 Call to Foy, Stockton, .70”

(Testimony of Howard F. Lauritzen.)

Q. Mr. Lauritzen, will you state the conversation you had with Mr. Foy on May 15?

A. I called Mr. Foy and asked him if he had a derrick barge available for some work at Vallejo, and he told me he had the large derrick barge available and it was in condition to work, and then I asked him what his rates were going to be, and he said the rates were \$10 per hour but if we used it for less or fired it up there would be a minimum charge for four hours, and that we would have to take care of the fireman's and engineer's wages beyond the four hours, because they had to be paid a minimum of a day's wage when they came out; it was a union rule. Then I asked if the derrick barge was insured and he said it was fully covered by insurance. Then I said, "Your \$10 per hour includes the operator, fireman, oil, water, and *the* insurance?" And then he said, "Yes"; and then I said, "Well, that sounds all right. When can we get the barge?"

He said, "We can get it ready and have it out the next day for you." I said, "All right; how about towing it up?" He said he could arrange to have it towed up with his boat and then taken away again, and we would have to pay the towing to and towing out charges. That is as near as I can remember what our conversation was at the time.

Q. The barge did work on the job on May 16, 19, and 20? A. It did.

Q. The fire on the barge occurred on May 21?

(Testimony of Howard F. Lauritzen.)

A. Yes, sir.

Q. Did you receive the original of this bill, marked Respondent's Exhibit A (showing document to witness)?

A. Yes, sir. [145]

Q. And what did you do with that original bill?

A. I wrote a letter and returned it to the Stockton Sand & Gravel Co.

Q. I show you Respondent's Exhibit B. Is that the letter with which you returned the bill?

A. Yes, sir, it is.

Q. Did you subsequently to sending this letter receive another bill from the Stockton Sand & Crushed Rock Co.?

A. I did.

Q. I show you Respondent's Exhibit C.

A. That is the bill.

Q. Is that the bill you received after sending back the first bill?

A. That is right.

Q. The pencil notations on here were put on in your office?

A. By my bookkeeper.

Q. You paid that bill?

A. Yes.

Q. In the amount?

A. In the amount of—it was paid in the amount of \$238.88.

Q. And in making that payment, did you send Respondent's Exhibit D to the libelant (showing document to witness)?

A. Yes, sir; I did.

Q. Do you know D. E. Williams and Adrian Westall?

A. Yes, I do.

Q. Did you know them in May of 1941?

A. I did.

(Testimony of Howard F. Lauritzen.)

Q. Did they work on the Foy barge on May 16, 19, and 20, 1941? A. They did.

Q. What were their jobs?

A. Westall was fireman and Williams was an operator.

Q. Please state the circumstances under which they went to work on the Foy barge?

A. Well, on the—when the derrick barge arrived over there—well, the day before, I had sent Mr. Kitchen down to Oakland to see that the barge was [146] under way, and then he told me at that time that they would not be—that he had been informed by the Foy's they would not be able to furnish an operator with the derrick barge, and on the following night, she arrived over there, he called me and informed me they would not be able to furnish a fireman and that we would have to get them a fireman and operator, and we had this fireman and operator working for me as second shift on my own derrick barge, and I told these men to go over there and work for Mr. Foy on the derrick barge.

Q. Did you pay the wages of these men for the three days they worked, Mr. Lauritzen, on the Foy barge? A. We did.

Q. And you charged those back to the libelant, according to this bill, Respondent's Exhibit D; is that correct? A. That is right.

Q. Did you at any time, Mr. Lauritzen, agree with Mr. Foy, Mr. Foy, Senior, to furnish a crew for the derrick barge? A. No.

(Testimony of Howard F. Lauritzen.)

Q. Did you at any time give Mr. Westall or Mr. Williams any orders as to the operation of the Foy derrick barge? A. No.

Q. Mr. Westall had worked for you on your derrick barge a short time before he was sent over to the Foy barge?

A. Mr. Westall had been in my employ about two weeks prior to that time.

Q. Would you state whether or not his services had been satisfactory?

A. His services were satisfactory; liked him very well.

Q. Do you own a derrick barge, Mr. Lauritzen?

A. I do.

Q. Does it have a vertical boiler?

A. It has.

Q. You also own a pile driver? A. I do.

Q. Does it have a vertical boiler?

A. It has. [147]

Q. Are you familiar with the operation of a derrick barge? A. I believe I am.

Q. How long have you been familiar with them?

A. Well, we have owned this barge perhaps ten years. I have been around boilers many years before that, pile driver boilers.

Q. Was your derrick barge at one time equipped with an automatic fireman? A. It was.

Q. Will you explain briefly what an automatic fireman is?

A. An automatic fireman is that she maintains

(Testimony of Howard F. Lauritzen.)

the steam pressure and the water line in the boiler at a constant thing all the time, without an attendant; in other words, you haven't anybody around it at all.

Q. When you fired your derrick barge with this automatic fireman, was there any human being in attendance on the fire?

A. Not always, no; I would say there was times of as much as two hours there was no man that went down to look at the fire.

Q. From your experience, Mr. Lauritzen, is there any necessity for a fireman to remain in constant attendance when they steam up a boiler?

A. No; I don't believe there is, if the equipment is in good shape.

Q. Now, Mr. Lauritzen, after the fire did you see Mr. Foy, Senior, and Mr. Darrah up on the Vallejo job?

Q. I met them over there one day; went over one day to look at the rig.

Q. This was after the fire?

A. This was after the fire; yes.

Q. Do you recall what day it was?

A. No; I don't recall what day, the day of the week. The particular thing I was interested in that time was getting that derrick barge out of there so that we could proceed with the job. The Navy [148] Department was anxious to have that job completed. The housing project was about completed

(Testimony of Howard F. Lauritzen.)

and they wanted to get the job through. The derrick barge was holding the job up.

Q. On that occasion did you have a conversation with Mr. Foy and Mr. Darrah?

A. I did.

Q. Would you please state what was said?

A. After looking the thing over there, I talked to Mr. Foy about getting the derrick barge moved out of there. I believe he told me as soon as the insurance people were satisfied, he would move it, or they were going to move it. Then the question came up about our verbal agreement with Mr. Foy, which I went over there with him at the time about this agreement and about the insurance on the thing, that the thing that I wanted straight in my mind at the time was that our conversation over the phone was clear, so that the insurance companies wouldn't take subrogation and sue me on the thing, and at the time Mr. Darrah spoke up and said, I believe, "that is the agreement with Mr. Foy. You have nothing to worry about. Mr. Foy will live up to his contract."

Q. What had you stated, if anything, as to the verbal agreement on the insurance?

A. Well, that he was to have it; and he was to carry insurance on the thing; he was to carry insurance on it. He was insured; that was included in the price of \$10 an hour, the insurance.

Mr. Tweedt: I think that is all.

(Testimony of Howard F. Lauritzen.)

Cross Examination

Mr. Ellis: Q. Mr. Lauritzen, you say you have been familiar with steam boilers quite a good number of years? A. Yes, sir.

Q. These steam boilers you have on your derrick barge and on [149] your pile driver, they are subject to State inspection, are they?

A. That is right.

Q. And they are regularly inspected?

A. That is right.—They are not inspected, but we carry boiler insurance and the boiler insurance people have their inspectors inspect the boilers.

Q. Are you familiar with the rules of the Industrial Accident Commission with reference to the operation of boilers? A. Not entirely, no.

Q. Do you know what their rules are with reference to attendance on a boiler when it is in service?

A. No; I wouldn't say that I do know that.

Q. Are you familiar with Order No. 850 promulgated by the—Boiler Safety Orders promulgated by the Industrial Accident Commission of the State of California, which reads as follows:

“No boiler while in active service shall be left unattended, regardless of whether or not it is equipped with automatic water feed regulator, fuel and damper regulators, high and low water alarm, or any form of automatic control. By ‘active service’ is meant that portion of time when the main stop valve is open and the fires are burning.”

(Testimony of Howard F. Lauritzen.)

Are you familiar with that rule?

A. No, sir.

Q. You never heard of it? A. No, sir.

Q. Your work as general contractor involves what, building? Was it building of buildings?

A. No; heavy construction.

Q. Heavy construction of manufacturing plants, and so forth? [150]

A. Pile driving, wharves, docks.

The Court: In this case, a sewer.

The Witness: A sewer.

Mr. Ellis: Q. Yes; I see. Now on the Foy 1, they did the work on that, didn't they; I mean the Foy's furnished the crew for that; didn't they?

A. That is right.

Q. And one of the bills that they sent you included the work for both jobs, did it not? I mean for the rental of the Foy No. 2 and also the service of the Foy 1; is that right?

A. They were separate bills.

Q. Didn't you receive a bill for \$677—You received this bill, did you not, from Stockton Sand and Crushed Rock (showing document to witness)?

A. I received this statement, yes.

Q. That is for \$637.77?

A. That is right.

Q. And it is billed under date of June 30, by the Stockton Sand & Crushed Rock to Bundensen & Lauritzen? A. That is right.

Q. And that \$637.77 included \$75 for towing the barge back, did it not?

(Testimony of Howard F. Lauritzen.)

A. I don't remember just what the figures are. I presume it was, yes.

Q. And included the \$315 for the rent of the Foy 2, less the wages you paid?

A. That is right.

Q. And also included the amounts for the Foy 1?

A. That is right. That statement included all that.

Mr. Ellis: We will offer this bill in evidence.

The Court: It may be admitted and marked.

(Thereupon the bill referred to was received in evidence and marked Libellant's Exhibit No. 1.)

LIBELLANT'S EXHIBIT No. 1

(Billhead)

Oakland, Cal., June 30, 1941

M Bundesen & Lauritzen,
Pittsburg, California.

In Account with
Stockton Sand & Crushed Rock Co., Inc.
River Sand—Crushed Rock—Towing
Clam Shell Digging and Unloading—Pile Driving
Hotel San Pablo

All Bills Due 10th of Month following Delivery
Statement (Itemized bills already rendered) \$637.77

Mr. Ellis: Q. And, Mr. Lauritzen, in the letter of [151] July 8, which has been introduced in evi-

(Testimony of Howard F. Lauritzen.)

dence as Respondent's Exhibit E, which begins, "Attached is our statement covering the work done for your company during the month of May, 1941, at your Vallejo job," this statement of \$637.77 was included with this letter, was it not?

A. I presume that it was.

Q. Have you ever had any experience firing boilers; did you ever fire a boiler?

A. I have.

Q. What kind of boiler?

A. Vertical boiler; donkey boiler; Scotch boiler.

Q. In the experience you have had, how did you start the boilers that you have been familiar with?

A. Well, we started with wood.

Q. That is, you built a fire? A. Yes.

Q. Did you ever have any experience starting them with Diesel oil?

A. Well, starting off, yes; I have.

Q. And where it comes in by gravity feed, similar to this barge?

A. The pile driver is operated by Diesel at all times.

Q. I mean where you start up on Diesel oil and then change over to the crude oil.

A. Yes; that is right.

Q. That is a rather common form of installation?

A. I wouldn't say it was. On this particular piece of equipment of ours, fired with Diesel oil,

(Testimony of Howard F. Lauritzen.)

later I hooked it up to the compressor just for a temporary arrangement.

Q. That is on your rig? A. Yes.

Q. How do you start with that Diesel oil on your rig?

A. Place a burning rag in the furnace, turn the air on, then the oil, and gradually bring it up.

Q. You burn Diesel oil all the time, do you?

[152]

A. On the pile driver the boiler operates on Diesel oil all the time.

Q. And in starting it you are faced with the same situation they were with reference to the fact you had no steam and had to use air pressure to atomize to start; is that correct?

A. The general practice on the pile driver is to start with wood; we don't use air on it, just once in a while.

Q. Did you ever start it yourself using the air?

A. I have.

Q. The air would be used to atomize the Diesel oil?

A. That is right.

Q. How long did it take you to get up steam using that method, so you could atomize with steam?

A. About an hour; you shouldn't take it faster than an hour or you will ruin the boiler.

Q. You take it rather slowly?

A. Yes; three-quarters of an hour.

Q. Did you throw a burning rag in there when you used the Diesel oil to start with? A. Yes.

(Testimony of Howard F. Lauritzen.)

Q. Did you light the rag first and then throw it in?

A. No; hold it right in the door and light the rag and throw it in.

Q. When do you turn off your air?

A. When the steam is—When you get this steam pressure.

Q. That would take about an hour?

A. Yes.

Q. Is the oil coming in under pressure or by gravity? A. Gravity.

Q. The boiler is gravity feed altogether?

A. That is right.

Q. And in all of your experience in that barge, did the fire ever go out?

A. No; I don't think the fire went out for [153] me, as I remember. I fired it several times.

Q. Did you ever have an occasion on the barge where the fire did go out?

A. No; not when it is firing up.

Q. Later on, did you? A. Oh, yes.

Q. What would be the result?

A. There would be a flare-back; if the boiler was hot you would get a flare-back.

Q. Did you ever lose a barge?

A. No, sir.

Q. You had somebody in attendance right there when the flare-back came and he controlled it?

A. Not necessarily; no.

Q. What would be the procedure when you would get a flare-back?

(Testimony of Howard F. Lauritzen.)

A. Just get a "Whoof!" and blow the boiler door off. If your face was right there you would get burned.

Q. Would it be dangerous to have that flare-back come—I mean for the fire to go out with no one in attendance.

A. I don't think there would be any danger if the fire went out.

Q. The oil would keep coming, wouldn't it?

A. Yes; it would keep coming—well, I don't know if it would or not; it may or may not. What would cause the fire to go out?

Q. I don't know. I just understood they do go out sometimes.

A. The only think that would cause the fire to go out would be a plug in the line.

Q. That might happen?

A. If you didn't have strainers in your line; if the oil was not clean; if the connection in the pipe—something like that would cause some trouble.

Q. If it did go out you might have trouble with the oil coming in with no fire?

A. It wouldn't ignite if the bricks weren't hot enough to cause it to ignite.

Q. How long would it take the bricks to get hot enough? A. I would say half an hour.

Q. You are speaking of a cold boiler?

A. Yes. [154]

Q. If you operate a boiler one day, isn't there quite a bit of heat retained the next day?

(Testimony of Howard F. Lauritzen.)

A. There is.

Q. You don't say it would take about half an hour to get hot enough then?

A. I would say at least twenty minutes.

Q. How long have you known Captain Foy?

A. I don't know just how long I have known Captain Foy. I have known of the Foy's for many years. I was born and raised on the river. Mr. Foy has been around there many years.

Q. Do you know he is a little deaf?

A. What is that?

Q. Do you know he is a little deaf?

A. Yes; I know he is a little deaf.

Q. This conversation you said you had with him, is it your statement that you, in effect, said exactly what you said in that letter; in other words, that you repeated back to Captain Foy that the rental was to include the operator and fireman, and water, fuel, oil, and insurance? A. That is right.

Q. In other words, you repeated that back over the phone to him? A. That is right.

Q. Mr. Foy told you that they were insured, didn't he?

A. He said the equipment, the barge, was fully covered with insurance.

Q. And he said nothing about giving you any benefit of any insurance, did he?

A. He said that—when I repeated to him then about including the time per hour on the insurance—yes, he did, that it would include the insurance.

(Testimony of Howard F. Lauritzen.)

Q. He did not say you were to get the benefit of the insurance; what he said was, "Yes, we have insurance protecting us"?

A. No; he said, "The derrick barge is fully covered with insurance." That, "the derrick barge is fully covered."

Q. Did he say, "we"?

A. I think he said, "We were fully [155] covered," meaning him and the derrick barge.

Q. He didn't at any time say that you were protected by that insurance, Bundensen & Lauritzen had the benefit of that insurance; he never at any time said that, did he?

A. No; he did not say those words.

Q. When did you say was the first time that you knew that you were to have to furnish the crew?

A. The first time I knew I was going to have to furnish the operator, furnish an operator, get an operator, for you was on the day that the derrick barge came up there—the day before, I guess, when Mr. Kitchen went down to see that the derrick barge got started off. When he came home he told me that they were not going to have an operator.

Q. They started towing it down there on the 15th, did they, the day before you operated?

A. They brought it up the evening of the 15th.

Q. You saw Kitchen went where, over to where the barge had previously been?

A. Yes: down to Alameda, I believe.

Q. What was his purpose in going over there?

(Testimony of Howard F. Lauritzen.)

A. To see that the barge got away. We had to get it up there that evening in order to get it in on the tide.

Q. Did he go on board the barge, do you know?

A. That I don't know.

Q. Then when he came back, you say he told you, "They haven't got any crew. You will have to get a crew for it"; or words to that effect?

A. He says, "They will not be able to furnish their operator because he is on another job." We would have to get them—get another operator for them.

Q. When did you see Westall then?

A. I saw Mr. Westall the night that she arrived on the job over there, your derrick [156] barge arrived on the job; that was the night of the 15th.

Q. About what time was that?

A. Oh, I saw Westall—— It was in the—— Well, I should judge around seven or eight o'clock, maybe nine o'clock, in the evening.

Q. Did Westall come on the barge that night?

A. On which barge?

Q. On the Foy 2, the one we are talking about?

A. No; he didn't come on the barge that night.

Q. Did you contact the union hall?

A. I don't remember if I did or not.

Q. You say Foy was working on another barge for you at that time?

A. No; I did not.

Q. How did you get in touch with Westall?

A. Westall was working for me at the time.

(Testimony of Howard F. Lauritzen.)

Q. That is what I am talking about.

A. You said Foy.

Q. I misstated the name. Westall was then working for you? A. That is right.

Q. Where did you find him?

A. On our derrick barge.

Q. You went over and told him, "We are going to need you on this other barge"; is that right?

A. No; I told him he was to go and work on the Foy derrick barge for Mr. Foy on the following day; they wouldn't have a fireman and we were going to loan him to the derrick barge.

Q. Where did you get Williams?

A. He was on the derrick barge on the same shift as Mr. Westall.

Q. They had worked as a crew together before?

A. That is right.

Q. How big is the barge they were working on?

A. Forty by eighty.

Q. What kind of a boiler does it use?

A. Vertical boiler on it. [157]

Q. How is that started?

A. Started by a wood fire and operates on fuel oil.

Q. Crude oil? A. Heavy fuel oil.

Q. Heavy fuel oil? A. That is right.

Q. It did not have any Diesel oil starter on it?

A. No, sir.

Q. Did Williams go over there that evening?

(Testimony of Howard F. Lauritzen.)

A. No; he did not.

Q. When did Williams come aboard?

A. I believe Williams went aboard your barge the following morning, the morning of the 16th.

Q. Were you there when it came in?

A. No; I was not.

The Court: It is a quarter after twelve. Will you be able to get through with this witness?

Mr. Ellis: No, I think not right now.

The Court: Very well. We will adjourn until two o'clock.

(Thereupon, at 12:15 p.m. an adjournment was taken until 2:00 o'clock p.m. this day.)

[158]

Afternoon Session

Mr. Ellis: Q. Mr. Lauritzen, I will show you this daily time card for Bundensen & Lauritzen, dated May 16, 1941, covering Job No. 375. I will ask you if that is the time card for work done by derrick barge, Foy No. 2, the one we are talking about, on the 16th?

A. Yes; this is the time card for that day.

Q. And the notations on the card are with reference to that job? A. That is right.

Mr. Ellis: I ask that this be marked and offer this in evidence as libelant's exhibit next in order.

(The time card referred to was thereupon received in evidence and marked Libelant's Exhibit No. 2.)

(Testimony of Howard F. Lauritzen.)

LIBELANT'S EXHIBIT No. 2

Job No. 375

Date May 16-41

DAILY TIME CARD

Bundesen & Lauritzen
Pittsburg, California

Shift from 5 A. M. to 12:15 M.

Equipment	Setting Up Pumps	Rigging	Clamming	Framing		
Foy Derrick						
Barge						
Name and No.					Ttl. Hrs.	Rate
C. F. Webster.....		3		5	8	1.40
Paul Johnson		3	5		8	1.40
Ray Sparrow		3	5		8	1.40
W. Wasson		3		5	8	1.40
Herb Mitchell	3		5		8	.80
D. E. Williams.....					8	1.60
A. Westall					8	1.10
R. Hyde		3		5	8	1.70

Foy Derrick hrs. 5 A. M. to 12:15

Clammed 5 hrs.

Rigged 3 hrs.

8 hrs.

Remarks: Condition of Foy Derrick necessitated 3 hrs. of rigging before ready to operate.

Foreman ROBERT HYDE

Mr. Ellis: Now, I will show you this time card—

The Court: There is no objection to all these time cards going in?

Mr. Tweedt: No, your Honor. I might ask, are these time cards needed at all in connection with the Navy Department any longer?

(Testimony of Howard F. Lauritzen.)

The Witness: Not as far as I know.

The Court: We are wasting a lot of time in this case, gentlemen.

Mr. Ellis: Would you prefer that I read them into the record? This is the time card, Job No. 375, Bundensen & Lauritzen, dated May 16, 1942; shift 5:00 a.m. to 12:15 M., for the derrick barge and carries among eight men on the time card, among whom are listed A. Westall working eight hours at \$1.10 an hour, and D. E. Williams working eight hours at \$1.60; with the further notation—I guess this is stipulated—prepared by Robert Hyde, foreman on the job. [159]

Mr. Tweedt: Yes.

Mr. Ellis: With the notation “Foy derrick hours 5:00 a.m.—12:15, clam 5 hours, rig 3 hours, total eight hours.” Under “Remarks”: “Condition of Foy derrick necessitated three hours of rigging before ready to operate. Signed, Robert Hyde.”

Q. I show you another time card on the 19th, covering the same job. A. Yes.

Q. Is that correct? A. That is right.

Q. This shows A. Westall and D. E. Williams working 5:00 a.m.—12:15 M. on the Foy derrick barge, eight hours each.

Then on the 20th, this time card shows the situation with reference to the 20th and the work done on that day? A. Yes; it is the——

Mr. Ellis: On the 20th they worked from 5:00 a.m. until 12:15 M., which would be noon, eight hours each.

(Testimony of Howard F. Lauritzen.)

I offer these three time cards, 16th, 19th, and 20th, in evidence.

(The time cards referred to were thereupon received in evidence and marked Libelant's Exhibit No. 3.)

LIBELANT'S EXHIBIT No. 3

Job No. 375

Date May 21

DAILY TIME CARD

Bundesen & Lauritzen

Pittsburg, California

Shift from 5 A. M. to 12:15 P. M.

Equipment

Foy Derrick

Barge

Fighting Fire

Name and No.			Ttl. Hrs.	Rate
C. F. Webster.....	✓	Pd.	6	1.40
Paul Johnson	✓	Pd.	6	1.40
Ray Sparrow	✓	Pd.	6	1.40
W. Wasson			x 6	1.40
Herb Mitchell			x 8	.90
Leroy King	✓	Pd.	5½	.80
Fred Martin	✓	Pd.	5½	.80
H. E. Branyon.....			8	.80
D. E. Williams.....			x 4	1.60
A. Westall		Check	6	1.10
Al Stocker		"	4	1.40
R. Hyde			6	1.70

Westall, 1814 Central Ave., Alameda, Calif.

Remarks:

Foreman ROBERT HYDE

(Testimony of Howard F. Lauritzen.)

Job No. 375

Date 5/20/41

DAILY TIME CARD 19th

Bundesen & Lauritzen

Pittsburg, California

Shift from 12 A. M. to 8 P. M.

Equipment		Reclaiming Lumber	Labor	Moving Barges (Overtime)	Framing	Pushing	Ttl. Hrs.	Rate
Barges								
Lumber								
Name and No.								
F. Pettibone						12	12	1.70
E. McCullough				2	8		12	1.40
C. Holter				2	8		12	1.40
G. Riise				2	8		12	1.40
E. Jackson		8					8	.80
E. Lovely		8	2	(8)			12	.80
C. Martin		8					8	.80
G. Parker		8					8	.80
W. O. ———?				2	8		12	1.40

Here's white ticket Will send name next report.

No steam on this sheet.

Remarks: Tide bad. High wind. Hand work. Had to use Spanish windlass. Barges drew mud.

Foreman FRANK PETTIBONE

(Testimony of Howard F. Lauritzen.)

Job No. DAILY TIME CARD Date 5-19-41
 Bundesen & Lauritzen
 Pittsburg, California
 Shift from 5 A. M. to 12:15 P. M.

Equipment		Clamming	Framing	Ttl. Hrs.	Rate
Name and No.					
Foy Derrick					
Barge					
C. F. Webster.....			8	8	1.40
Paul Johnson	4	4	8	8	1.40
Ray Sparrow	4	4	8	8	1.40
W. Wasson		8	8	8	1.40
Herb Mitchell	4	4	8	8	.80
D. E. Williams.....			8	8	1.60
A. Westall			8	8	1.10
R. Hyde		8	8	8	1.70

Foreman ROBERT HYDE

Job No. 375 DAILY TIME CARD Date May 20
 Bundesen & Lauritzen
 Pittsburg, California
 Shift from 5 A. M. to 12:15 P. M.

Equipment		Clamming Rigging	Ttl. Hrs.	Rate
Name and No.				
Foy Derrick				
Barge				
6" Pump				
C. F. Webster.....		8	8	1.40
Paul Johnson		8	8	1.40
Ray Sparrow		8	8	1.40
D. E. Williams.....		8	8	1.60
A. Westall		8	8	1.10
Herb Mitchell		8	8	.90
Fred Martin 556-14-1151		8	8	.80
H. Branyan 556-05-5070		8	8	.80
L. King 552-20-9010		8	8	.80
R. Hyde		8	8	1.70

Remarks: Broke #2 line clamming.

Foreman ROBERT HYDE

(Testimony of Howard F. Lauritzen.)

Mr. Ellis: Q. Mr. Lauritzen, at the time you had the conversation with Mr. Foy when you were negotiating for the barge, at that time you did not contemplate using your own crew, did you?

A. I did not.

Q. At that time you thought they were going to furnish the crew? A. That is right.

Q. As a matter of fact, didn't Mr. Foy tell you then they didn't have a crew and you would have to furnish one? A. No.

Q. He did not? On the morning of the 16th you had—the barge had a different rigging than you wanted; is that correct?

A. I was not there on the barge or on the job the morning she [160] was working. I did not see the derrick; wasn't over there; so the only thing I have is what is on that card there.

Q. The time you saw Mr. Foy and Mr. Darrah over there at the barge, I think it was the day after the fire, do you recall that?

A. I think I saw them—it was several days after the fire. It was after the fire, yes, sir.

Q. Mr. Foy was trying to locate the fireman in order to see what happened on that morning, do you recall?

A. That I don't know, if he was over there for that purpose. I think he asked me about the fireman at that time.

Q. He was trying to locate the fireman to see

(Testimony of Howard F. Lauritzen.)

just what did happen that morning?

A. That is right.

Q. I will ask you this: You recall a conversation there with Captain Foy on that day at the service station?

A. I had a conversation with him.

Q. Was the conversation to this effect, that Captain Foy asked you where this man Westall would be or was, and you replied, "I don't know. I got him through the union. We could get him through the union hall; probably get his address through the union hall"? A. Yes.

Q. Then you said to Captain Foy, "You know I asked you if she was insured"; do you recall that?

A. No; I don't.

Q. Do you recall Captain Foy's answer, "Yes; I told you we were fully covered but that was only for all kinds of risks, not for the full value"; do you remember him saying that?

A. No; I don't remember him saying that.

Q. Do you remember asking him how much insurance he had?

A. No; I don't remember asking how much insurance he had?

Q. Didn't he say he only had \$12.000?

A. No; he did not. [161]

Q. And you said, "That is too bad."

A. No.

Q. You don't recall any of that conversation at all? A. No.

Q. This bill—have you the bill for \$677?

The Court: That bill is in evidence.

(Testimony of Howard F. Lauritzen.)

Mr. Ellis: I guess it will be stipulated too that the insurance policy or compensation insurance carried by Bundensen & Lauritzen on Mr. Westall and Mr. Williams, that the interest of the employer in that could not be assigned to any other person if there is a policy in effect.

Mr. Tweedt: I don't quite understand the question. Bundensen & Lauritzen carried Workmen's Compensation. Under that policy they declared Williams and Westall.

Mr. Ellis: As their employees.

Mr. Tweedt: As their employees. I don't see what that has to do with the case. Workmen's Compensation covers only accidents. There are no accidents in this case.

Mr. Ellis: The policy provides they couldn't assign their interest to any other person.

Mr. Tweedt: I think it could. Almost invariably when his employees went to work for other persons, the other people declared them. If you can find that in your policy, you can put this specimen policy in evidence.

Mr. Ellis (referring to document): There is this clause in this policy: "It will be understood the interest of the employer in this policy cannot be assigned to any other person or organization."

Mr. Tweedt: I will stipulate the policy so provides.

Mr. Ellis: That is all.

Mr. Tweedt: I want to look at these time cards.

I have an idea you got the wrong ones in. Did you intend to show by [162] these that these two men appeared on the cards? If you did, I think you put the wrong cards in evidence. Here is one card with Williams and Westall on. Here is another card with Williams and Westall on. This one does not have them. This one does not have them.

Mr. Ellis: I guess I got the wrong ones in there.

Mr. Tweedt: That one does not have them. That one does not have them, and these two have them.

Mr. Ellis: We will add these two to the exhibits, then.

The Court: Are there further questions from this witness?

Mr. Tweedt: No further questions, your Honor.

The Court: Step down.

Mr. Tweedt: Mr. Kitchen.

ROBERT P. KITCHEN,

a witness called for respondent, sworn.

The Clerk: Will you state your name?

A. Robert P. Kitchen.

Direct Examination

Mr. Tweedt: How old are you, Mr. Kitchen?

A. Thirty-five.

Q. What is your present occupation?

(Testimony of Robert P. Kitchen.)

A. My present occupation is machinist superintendent.

Q. Where are you working?

A. Marin Shipyard.

Q. What was your occupation in May of 1941?

A. Construction superintendent.

Q. For whom?

A. Bundensen & Lauritzen.

Q. And how long had you, in 1941, been engaged in the construction business?

A. Oh, I have been in it since about 1928, somewhere around in there.

Q. How long had you worked as superintendent for Bundensen & [163] and Lauritzen?

A. About eighteen months.

Q. Were you superintendent for Bundensen & Lauritzen on the sewer job above Vallejo on May 21, 1941?

A. Yes, sir.

Q. Where was the Foy No. 2 derrick barge located at the time of the fire on board?

A. About a quarter-mile above the Sears Point cut-off bridge above Vallejo on the Napa River.

Q. Had you seen the Foy No. 2 prior to her arrival at that job?

A. Yes; I had.

Q. Where did you see her?

A. At the Associated Oil Dock at Alameda.

Q. Do you recall what day it was?

A. It was on May the 15th.

Q. What was the occasion for your going aboard the barge at that time?

(Testimony of Robert P. Kitchen.)

A. Well, I wanted to be sure the barge got up to Vallejo in time to catch the flood tide and come in on the mud flat there. They got away in time to make the flood tide and had the right instructions where to go.

Q. Were you present when the barge arrived at the job at Vallejo? A. Yes, sir; I was.

Q. Do you remember when it was the barge arrived?

A. I would say around about between five and six p. m.

Q. On what day? A. On the 15th.

Q. On the day the barge arrived, did you have any conversation with Mr. Ed Foy?

A. Yes; I did.

Q. Did you have any conversation with Ralph Foy? A. Very little.

Q. Was Mr. Ed Foy on the barge when it arrived at the job? A. No; he was not.

Q. He arrived subsequently?

A. He was ashore.

Q. And on that same day—will you please state the conversation you had with Mr. Ed Foy?

A. Well, the best [164] I can remember, it was just about dusk in the evening and we discussed bringing the barge in over the mud flat and he told me that he couldn't furnish the crew for the barge, and we were kind of stuck for men at the time, and it was almost impossible for us to furnish them, as experienced men at that time were not available,

(Testimony of Robert P. Kitchen.)

and it meant robbing another job. I explained that to him, and he had to have—he himself was the operator and he had to be on another job that was going to start the next morning.

Q. When you state “he” you are referring to Ralph Foy?

A. Ralph Foy; and I agreed to take off some men off another job and turn over to him. He was to stay there and instruct the men so that they were capable of carrying out the duties of the barge there to his satisfaction.

Q. Were you on board the barge the morning of May 16? A. Yes; I was.

Q. Who was on board at that time?

A. We had a crew on there, a pile driving crew, and we had—there was an operator and fireman and Ralph Foy, and I think his fireman was there.

Q. Did Ralph Foy and the fireman that was with him remain on board her that day?

A. A short time that morning.

Q. Did you have any conversation with Ralph Foy with respect Mr. Westall before he left the barge? A. Yes; I did.

Q. What was said at that time?

A. I asked him if the men were competent in taking care of the barge and performing their duties there that we expected the barge to perform.

Q. How many days did the barge operate prior to the fire on that job?

A. I think it was three days, if I am not mis-

(Testimony of Robert P. Kitchen.)

taken. We had a week in there we didn't operate her. [165]

Q. Were you aboard her from time to time during those three days? A. Yes, sir; I was.

Q. Did you observe her operation during those days? A. Yes.

Q. Did you observe the condition of the barge?

A. Yes.

Q. What did you observe as to the condition of the hull of the barge?

A. The hull was in very poor shape, dry rot all over the deck; deck beams were dry rot and she was making a little water.

Q. What effect did her leaking have upon her operation in doing your work?

A. Well, the only thing is we had to try to keep her pumped out, keep her dry, otherwise she would drag on the mud flats, and for moving we would be drawing too much water.

Q. What if anything did you observe as to the condition of the deck on the barge?

A. Very poor. You had to watch your step there that you didn't fall through.

Q. What was the condition of the deck in the fire room?

A. There was a cake of oil caked over and it was a regular fire hazard by itself.

Mr. Ellis: Just a minute. We object. We ask that that stand out on the ground it is calling for the conclusion of the witness, if your Honor please.

(Testimony of Robert P. Kitchen.)

The Court: It may go out. You may develop what the situation was.

Mr. Tweedt: Q. Will you describe in detail for us the oil that you have referred to caking on the floor of the fire room?

A. Just an accumulation of oil from service previous over a number of months, I imagine; I don't know how long it would be—it had been that way, but it was built up crude oil and dirt or a collection of debris on it.

Q. Did the deck of the fire room show any signs of having been [166] steamed recently?

A. No, sir.

Q. Will you describe for us the connection between the Diesel fuel barrel and the fire box?

A. Well, it had an auxiliary connection there on the regular burner, the oil line, for steaming up, and then—I think it was about a three-eighths or half-inch line, steel line, and it was approximately three or four feet long; three feet, I would say, running vertical and the hose was connected off that, and the hose was extended, oh, I would say, from the boiler to the outside of the house which was about, oh, about ten or twelve feet long, something like that, and the can that the Diesel oil was in was on the side of the house, on the port side, up high enough so it would get a gravity flow, which was about seven or eight feet above the deck; and I don't recall whether there was a valve on the can or not. There was a valve next to the burner.

(Testimony of Robert P. Kitchen.)

Q. Were there any strainers in that line?

A. None.

Q. Now, what did you observe as to the operation of the equipment on the barge; that is the winches and drums and lines?

A. Well, I know we spent a considerable amount of time that morning in getting the derrick to operate itself in order to overhaul the lines off the drums. They should roll fairly easy with the brakes released, and they had to be made safe, because we had a number of men working under the boom and around that equipment, and it had to be made safe, otherwise you couldn't operate; and it seems to me there was something wrong with the brake bands on it. They would either release all at once or otherwise you wouldn't be able to use them at all. They would take hold in such a way you couldn't overhaul the drums at all.

Q. Did you have any difficulty with the men working on the coffer dam as a result of the operation?

A. Yes; I did. [167]

Q. Will you state what that was?

A. It was very—It was hard to keep these men where they belonged, on account of the operation of the derrick. Whenever you picked up a load it was never reliable whether you were going to take it out of there or let her fall, and take a bunch of union men, as a rule they are very hard to get along with when you have a piece of equipment around like that.

(Testimony of Robert P. Kitchen.)

Q. Were you on the barge, Mr. Kitchen, at any time on the day of the fire?

A. Yes, sir; I was.

Q. When did you reach the barge?

A. At about five o'clock in the morning.

Q. Did you go on the barge?

A. Yes; I did.

Q. What did you do?

A. I went aboard the barge, and as soon as I saw the condition and what was taking place I left and got the fire department, which I had to go back to Vallejo to get to a telephone and call the department, and they had to call the County department, and between the two of them, they come down and got hose enough to reach the barge.

Q. Did you do anything on board the barge to fight the fire?

A. Yes; all we could do was get some of the debris out of the road there so it wouldn't spread any more than possible and try to get that bilge pump on the stern of the barge to operate.

Q. Were you able to operate that pump?

A. After a considerable loss of time.

Q. Was there a hose connected to that?

A. There was a hose there but it was not in very good shape and was not long enough to reach the fire in any case. It only reached just past the water tanks.

Q. Was there any other pump on board the barge that you saw?

A. No; there was not. [168]

(Testimony of Robert P. Kitchen.)

Q. What experience have you had, Mr. Kitchen, with operating derrick barges with vertical boilers?

A. I have operated them with all types of boilers, equipment of various sizes, all the way from—well, since I was practically a kid.

Q. Have you actually operated them yourself?

A. Pardon?

Q. Have you actually operated them yourself?

A. Yes; I have.

Q. Now, bearing in mind the type of boiler on the Foy No. 2, from your experience was there any necessity of the fireman remaining constantly before the firebox after lighting the fire?

A. No; there was not.

Q. Mr. Kitchen, you will recall that on the stern of the barge there was a house, crew's quarters.

A. Yes, sir.

Q. There was a lavatory in the crew's quarters?

A. Yes; there was.

Q. Showing you Respondent's Exhibit F, the house that appears on the stern of that barge is the crew's quarters? A. Yes.

Q. Were the crew's quarters, Mr. Kitchen, locked or unlocked?

A. The crew's quarters was locked.

Q. And why was that?

A. We did not want the crew going back there and stalling for time, which they generally do. It is a good place for them to go. Another thing, there was equipment in there we did not want stolen,

(Testimony of Robert P. Kitchen.)

taken out, that we would have had to replace had it been lost.

Q. Was the crew's quarters locked at all times the barge was up there?

A. It was. That was one of the first things I instructed to have done.

Mr. Tweedt: I think that is all.

Mr. Darrah: I did not get quite all the last answer.

(The reporter read the answer.) [169]

Cross Examination

Mr. Darrah: Q. One of the first things you instructed to have done was to have the crew's quarters locked? A. Yes.

Q. Were they locked, as far as you know, on the morning of the 21st?

A. They were locked up until the day before, but there was no reason for them to be unlocked that morning.

Q. Who had the key?

A. There was no key that I know of.

Q. Could they use the toilet?

A. No, sir; not without going in the door.

Q. If they wanted to go to the toilet, how did they arrange it; did they have to come to you for the key?

A. They generally went over the side.

Q. Did any of them ever come to you for the key? A. No, sir.

Q. What equipment was stored in there?

(Testimony of Robert P. Kitchen.)

A. Dishes and a Butane stove, I think, cooking utensils, bedding—I don't think there was any——

Q. Tools?

A. I don't believe there was any tools there. There might have been, but I never observed it close enough for that.

Q. You stated you had operated all kinds of boilers, that is, steam boilers, ashore?

A. No, sir, afloat.

Q. You said that it was not necessary for the man to remain at the firebox. Isn't it good practice for the fireman to stay in attendance on his fire when he has steam up?

A. If the equipment is in good shape, it is not.

Q. Are you familiar with Boiler Safety Order No. 850, which requires——

A. What you are referring to we don't observe in the Bay area here; we haven't, and nobody else around here.

Q. It is the Boiler Safety orders under the——

A. Yes. [170]

Q. ——the Industrial Accident Commission, is it not?

A. That is right.

Q. And you are not familiar with those orders?

A. I have never read them over.

Q. Do you know about this one—you heard it read before in court—"No boiler while in active service shall be left unattended." Did you ever hear of that one?

A. What do you mean by attended?

(Testimony of Robert P. Kitchen.)

Q. I don't know. I am not answering the questions. You are. Did you ever hear of that rule?

A. It is depending on how you interpret it.

Q. Did you ever hear of the rule? A. No.

Mr. Darrah: We will offer in evidence these rules. I presume the Court takes judicial notice of them.

The Court: It may be admitted and marked.

(The document referred to was thereupon received in evidence and marked Libellant's Exhibit No. 4.)

Mr. Tweedt: It is incompetent, irrelevant and immaterial in any case. We are dealing with a derrick barge afloat on the navigable waters of the United States.

The Court: What is this?

Mr. Tweedt: These are State rules of the State Industrial Accident Commission.

Mr. Darrah: They have testified these men were carried under compensation under the provisions of the State law.

Mr. Tweedt: There has been no testimony that the men were carried under Workmen's Compensation under the State law. There has been testimony they were insured for Workmen's compensation.

Mr. Darrah: Workmen's Compensation relates to the State law. [171]

Mr. Tweedt: I am aware that Workmen's Compensation relates to the State law, but there is such a thing as Workmen's Compensation that may be compulsory or that may not be compulsory. The

(Testimony of Robert P. Kitchen.)

Supreme Court of the United States has recently held that Social Security applies to seamen at sea but that does not mean that state inspection rules apply to seamen at sea or on navigable waters.

Mr. Darrah: We submit the rules are applicable, and if for no other reason, they show standards of conduct that have been prescribed and accepted. I submit they are the law and govern this operation.

The Court: But they answer that by saying, "We are out on the waters here. We are not subject to that regulation."

Mr. Darrah: It will take a word or two to go into it.

Mr. Tweedt: I have no real objection to their being received in evidence and considered although I would like to reserve that objection to it.

The Court: Very well.

Mr. Darrah: It is our contention that it was not under the provisions where it is subject to Federal inspection where passengers or freight are carried for hire. This was neither, therefore it should be covered by the state regulations and was.

Q. Now, Mr. Kitchen, you said something about that it was not necessary for a man to stand at the door of his firebox. Don't you think a man ought to, at least during the time he is generating steam, stay within sight of the firebox?

A. Not necessarily.

Q. Would you think it was good practice to go out of the building the fireroom was in and go

(Testimony of Robert P. Kitchen.)

around to another part of the [172] building and go into another building?

A. Not as long as you are in sight of the stack and close enough or within sight.

Q. Would a man in the toilet be in sight of the stack? A. Pardon?

Q. Would a man in the toilet be in sight of the stack?

Mr. Tweedt: I will object to that as assuming something not in evidence. I don't recall any testimony in this case, any testimony that the man went into any enclosed toilet. He used the word "toilet" in a very modest sense. I will demand production of the statement you took from Mr. Westall. What it says is he went out onto the deck to urinate, your Honor.

Mr. Darrah: I took the statement on May 22, 1941. If you wish, we will offer it in evidence.

Mr. Tweedt: Very well.

The Court: What does it disclose?

Mr. Darrah: It is a statement generally about the whole situation of the case.

The Court: What are you offering it for?

Mr. Darrah: Because Mr. Tweedt asked for it. I think the whole thing should come in.

The Court: Then read it, so I can follow it.

(Mr. Darrah thereupon read from the statement referred to, and during the reading was interrupted and the following took place.)

The Court: Ten minutes to what?

(Testimony of Robert P. Kitchen.)

Mr. Darrah: Ten minutes to four a.m.

The Court: Why did he start at that time?

The Witness: He came in a little early to start up. We worked early to work the tides. [173]

The Court: All right.

(Mr. Darrah thereupon completed the reading of the statement referred to.)

Mr. Darrah: I ask that this be marked as our next exhibit.

The Court: You took this down?

Mr. Darrah: Yes; I took this down and he signed each page and I gave him a copy immediately after.

(The statement referred to and read by Mr. Darrah was thereupon received in evidence and marked Libelant's Exhibit No. 5.)

LIBELANT'S EXHIBIT No. 5

A. A. Westall interviewed May 22, 1941, relative to burning of Foy Derrick Barge #2 located at job of Bundensen & Lauritzen at Vallejo.

I went to work as fireman on the above derrick barge Friday, May 16, 1941. I had been working several days on a company owned barge before that. The first morning we went out the engineer and fireman who had been on the barge under the owners, Foy, showed me how to fire it up—where the valves were, etc. They fired it up that morning. I had had no previous trouble with the boiler. The method of firing the boiler was to start a little gas engine near by to pump up air pressure which atom-

(Testimony of Robert P. Kitchen.)

ized the fuel when it was forced into the burner. I started that engine, soaked a rag in oil from the 15 gallon tank and threw the burning rag into the burner and turned on the air. It seemed to start alright. I had it turned down low. I stepped out on deck to urinate and in about 2 or 3 minutes I hear an explosion and I ran back (It had been burning about two minutes before I left). The flames were all around the bottom of the boiler on the floor. I grabbed an old jumper and an old sack and tried to smother it out.

ADRIAN A. WESTALL

In my excitement I didn't notice the fire extinguisher. It made it worse to try to smother it out. The flames soon communicated to other wooden parts of the barge toward the front, i. e. away from the living quarters, and soon the whole barge from the water tank forward was aflame. About 4:30 or 4:45 A.M. the fire department got there and about 9 or 9:30 had the fire under control and left. I left about that time.

I came to work that morning, yesterday, May 21, 1941 about 10 minutes to 4 A.M.

In starting the fire I had on the days previous and intended yesterday to do the same, that is use air pressure to atomize the diesel oil from the 15 gallon drum to start the burner and then after I got up about 40 pounds pressure I turned off the valve that let in the air and diesel oil and turned

(Testimony of Robert P. Kitchen.)

on the steam valve which then forced in the crude oil which was what we operated on. In this instance I hadn't gotten any steam pressure up.

I think the oil line probably ceased temporarily to flow during which time there ceased to be a flame. When the oil came back on the

ADRIAN A. WESTALL

heat caused it to vaporize and spontaneous combustion ignited it. I have had the experience of lighting a boiler or fire box that way—that is—after it had been in use and was turned off while it was still hot I would turn on a small amount of oil—it would smoulder a little and then ignite—That is alright when you are right there to watch it.

In this instance the explosion from the excess oil igniting after it had temporarily stopped flowing blew the excess oil out on to the deck, ignited it and also ignited the oil in the 15 gallon drum of diesel oil. It was not particularly windy.

It was clear weather.

It generally took about 40 minutes to get up the 40 lbs. pressure required to run on the crude oil.

I have fired boilers for the last 15 years. I never worked for Bundensen & Lauritzen before. My pay was \$1.10 per hour, double time for overtime, minimum of 2 hours if we don't work, and minimum of 1½ day if I work at all. I am 31 and married.

ADRIAN A. WESTALL

(Testimony of Robert P. Kitchen.)

Mr. Darrah: It was taken the next day after the fire, as indicated.

Mr. Tweedt: That is in your handwriting?

Mr. Darrah: Yes; each page, except the signature, and he signed it.

Q. In the deposition there was reference to the—I am just meeting Mr. Tweedt's objection—detailed description of where he was in the toilet: "Q. How far was the toilet from the firebox—Well, I don't mean exactly, but it is less than thirty feet, twenty feet away." It is rather specifically covered in the deposition, so I think we have a right to assume that was the situation, that he went to the toilet and did not urinate on the deck.

Did you notice fire extinguishers aboard the barge? You wouldn't say they weren't there?

A. Pardon?

Q. You wouldn't say they weren't there?

A. I did not see them.

Q. Did you notice the fire extinguishers at the side of each door of the engine room?

A. No, sir.

Q. Did you notice the fire extinguishers in the living quarters? [174]

A. No, sir. Just a minute. In the after end in the house, I do know there were none in there.

Q. What?

A. In the after house, because I went back there looking for them during the fire.

(Testimony of Robert P. Kitchen.)

Q. Did you notice them on the deck immediately after the fire? A. No, sir.

Q. Were you there the next day after the fire?

A. Yes, sir.

Q. You didn't think that the bilge pump was intended to put out fires?

A. That was all we had.

Q. Had you started that bilge pump previous to the time of the fire, or caused anyone else to?

A. I am not sure whether it had been running or not.

Q. You said you had to pump it out to keep it afloat. What did you pump it out with?

A. That bilge pump. That is what it was supposed to be pumped out with. There was about four feet of water in the bilges, though, during the fire, so I am not sure whether it was pumped out or not.

Q. You were in a general way in charge of the operation there, were you? A. Yes, sir.

Q. Driving sheet piling? A. Yes, sir.

Q. Did you tell the men what to do?

A. I told the foreman as a rule.

Q. Pardon me?

A. I instructed the foreman what to do as a rule.

Q. There was a foreman on the job?

A. Yes, sir.

Q. He stayed with the barge right along?

A. Stayed with it on his shift.

(Testimony of Robert P. Kitchen.)

Q. But you didn't stay there right along?

A. Not all the time.

Q. There were a number of other men who were on the barge [175] besides the fireman and operator?

A. That is right.

Q. They were all working for Bundensen & Lauritzen at the time; is that correct?

A. That is right.

Q. When you said you talked to Ed Foy, you were not talking with this gentleman over here (indicating); it was this gentleman, wasn't it?

A. It was this gentleman and his brother, and I am pretty sure his father with with him.

Q. The conversation you spoke of in your direct examination, was it Mr. Foy, or were you talking to him about it, this gentleman, or was it Ralph?

A. Wel, it was——

Q. You said he would show the men how to operate it.

A. Ralph was the one to do the showing.

Mr. Darrah: That is all.

Redirect Examination

Mr. Tweedt: Q. Mr. Kitchen, at the time you had the Foy No. 1 on this job earlier in May, the men employed by Bundensen & Lauritzen were also on and off the barge carrying out their work?

A. Yes; they were.

Mr. Tweedt: I think that is all.

The Court: That is all. [176]

Mr. Tweedt: If your Honor please, I demanded the production of the insurance policies covering the "Foy No. 2," and they have been produced. These gentlemen tell me they have promised to return them to the underwriters, but I would like to have the policies in evidence.

The Court: Very well.

Mr. Darrah: We have no objection. I think if it gets to a point where we have to have them back, we can stipulate to some way to get them out.

Mr. Tweedt: We can photostat them.

Mr. Darrah: Mr. Tweedt, in order to save the record, as you suggested before, is it going to be necessary that all of this be offered in evidence?

Mr. Tweedt: Of course, these original exhibits will not be written in. They will be part of the record.

The Court: They may be admitted and marked.

(The policies referred to were admitted in evidence and marked, respectively, Respondents' Exhibits H, I, and J.)

Mr. Darrah: Captain Foy, will you take the stand? You have already been sworn.

ED M. FOY,

recalled for libelant in rebuttal, having been previously sworn, testified as follows:

Mr. Darrah: Q. Captain Foy, do you remember a conversation with Mr. Lauritzen on the day

(Testimony of Ed M. Foy.)

you and I went down to the location of the "Derrick Barge No. 2," the day following the fire?

A. Yes; we had a conversation down there.

Q. May 22, 1941; that is the day we took this statement from Mr. Westall? A. Yes. [177]

Q. You were present, were you not, when this was taken? A. Yes.

Q. Now on that day, early in the day, isn't it a fact that we met Mr. Lauritzen?

A. Yes; we couldn't get down, that is, could not drive down, to the barge, oh, nearly a quarter of a mile, I think, and as we came back up there Mr. Lauritzen drove up, and I introduced you to him, and there was a little conversation there in regard to the use of the barge. I don't remember exactly what it was there. It was in regard to the——

Q. Was anything asked about who was on the barge? A. What?

Q. Was anything asked about who was on the barge?

A. Yes; and he told me that—let's see, he said that he knew the man's name, but did not go where he lived. At that time we did not know what burned up the barge, what was the accident, and we was looking for the fireman to find out his version of the fire. He says, "I got him through the union. I think we can get his address through the union." He did not know the man's address. Then we went up the road, I think, to an oil station close to the approach to the Sears Point Bridge, and went in

(Testimony of Ed M. Foy.)

and telephoned, I suppose the union, and got his address; and he said then, he said, "As you told me, you are covered by insurance. How much did you have?" And I said, "\$12,000"; and he says, "That is too bad."

Now, I don't know—I can't remember just all the conversation; that was about all there was, and we went immediately to look up Westall, and had to wait until he come home from his day's work after five o'clock to talk to Westall.

Q. At that time did I say anything to Mr. Lauritzen to the effect that he did not have anything to worry about? I will ask you this question: Did Mr. Lauritzen say, "Well, now, Mr. Foy, you told me that this barge was fully covered"; and did I then [178] interrupt and say, "Well, Mr. Foy, our company is insured. You have got nothing to worry about"?

A. I don't remember your saying anything at all up there about it.

Mr. Darrah: That is all.

Mr. Tweedt: No questions.

The Court: Is that the case, gentlemen?

Mr. Darrah: Just one little matter of rebuttal. Mr. Ralph Foy, will you take the stand again?

RALPH LEDINGHAM FOY,

recalled by libelant in rebuttal, having been previously sworn, testified as follows:

Mr. Darrah: Q. Mr. Foy, you heard the testimony of the preceding witness in which he said that in a conversation with you something was suggested that you would have to have a fireman or an operator, and an operator, and he said he would get them for you folks. Was that the conversation, or did he just say they would furnish the crew?

A. They said they would get the operator, but there was no mention of furnishing for us.

Mr. Darrah: That is all.

The Court: Just a moment. You were up there when the barge got up there, were you?

A. Yes, sir.

Q. Who was there at that time?

A. Mr. Kitchen and myself and my brother-in-law, and my brother come in on the barge, and the towboat crew.

Q. You were hazy on your recollection this morning when you testified. I want you now to repeat everything you can recall that anybody said there when that barge arrived.

A. Well, Mr. Kitchen was at the job when the barge—I arrived there before the barge got there. Mr. Kitchen come shortly after, if I remem- [179] ber correctly, and being a mud flat, the tug could not get in to where they were doing the work.

Q. I am trying to get this conversation.

(Testimony of Ralph Ledingham Foy.)

A. Mr. Kitchen and I talked over how we were going to get the rig in there.

Q. What was said?

A. Well, I suggested the easiest way I thought possible to get the rig in, and Mr. Kitchen agreed, and we run lines——

Q. When you say “agreed,” I would like to, and under the rule we must, take the conversation had at that time. It is hard for you to understand, but that is a conclusion that you agreed. You agreed what? I am trying to develop the conversation. I am only using that as an example for the rest of your testimony. Do you follow me?

A. I follow you, but I don’t know how to say it.

Q. Well, say it in your own way.

A. I can’t exactly remember the exact wording that Mr. Kitchen and I talked about.

Q. Well, as near as you can, or any part of it. That is all I am after. Well, all right, you got the barge in. What happened then?

A. We did not have any crew for it.

Q. Well, wait. You did not have any crew for it. What was said?

A. I told Mr. Kitchen we did not have any crew for the barge, and it was up to them to get the crew for the rig.

Q. Now, what did he say in response to that?

A. He said that he had a rig; I think the rig was

(Testimony of Ralph Ledingham Foy.)

working at Selby; and he could get a fireman to come over to fire the rig.

Q. Where would he get them?

A. Where did he get them? I think they were over at Selby on a rig.

Q. He said they were over on some other rig. Go on. That is not getting from the union, is it?

A. This man was already in their hire. [180]

Q. There is some testimony here that somebody was trying to develop that they got them from the union.

A. They did originally, a couple of weeks before, as I understood.

Q. All right, go on. Tell us what happened.

A. That is the only conversation that I directly remember with Mr. Kitchen.

Q. Is that the first time that he knew that you did not have a crew?

A. That was the first time I had seen him.

Q. Do you know whether that was the first time that he knew? A. I couldn't tell you that.

Q. Was there any other way that he would know?

A. Not unless he found out through Mr. Lauritzen beforehand.

Q. Who was Mr. Lauritzen?

A. Mr. Lauritzen, the owner.

Q. But that is all the conversation you can remember?

A. And the next morning; next morning I was

(Testimony of Ralph Ledingham Foy.)

there and he was there, and I can't remember any direct conversation with him. I can describe what happened and tell you what we did until the time I left.

The Court: Are there any other questions from either side?

Mr. Tweedt: I might ask one additional question, your Honor.

Cross Examination

Mr. Tweedt: Q. Were you aware of the contract for the use of the "Foy No. 2" before you went up there that day?

A. The only thing that I heard, I talked to my father, and he said he had rented the barge, the derrick barge, and to go onto this job at Sears Point, and told me approximately what time it would be in, and I arrived on the job to take care of it.

Q. Were you aware when you were talking to Mr. Kitchen that the charge per hour for the barge included wages of the crew?

A. We had never chartered the barge out before, and that was our working schedule whenever the barge was rented. That was what it [181] was supposed to rent for, and we always had beforehand, had furnished the crew for it. I operated it myself.

Q. Were you aware on this particular occasion that the \$10 per hour charge did include wages of the crew?

A. I don't have any recollection of anybody telling me exactly what the barge was rented for.

(Testimony of Ralph Ledingham Foy.)

The Court: That is, the amount?

A. As to the amount.

Mr. Darrah: Q. Did you know that you were not supposed to furnish the crew? A. Yes.

The Court: How did you know that?

A. Because we did not have any crew.

The Court: Who told you you did not have any crew?

A. I am sort of what you might call superintendent. I am sort of in charge of the equipment, myself, and I know whether we got a crew or not.

The Court: All right; step down.

Mr. Darrah: That is all we have.

(Discussion as to arguing or briefing the case.)

The Court: I am going to be frank with you. I can tell you now that you have the laboring oar. I will let you open and close if you want to. Do I make myself clear?

Mr. Darrah: I think so.

The Court: Then we will make it five days, two days, and three days to close. That will be ten days. I am only giving him two days, so he must of necessity anticipate what you are going to say; then I will give you three days to answer. Is that fair?

Mr. Tweedt: That is agreeable to me, your Honor.

The Court: 5, 2, and 3. I will put it over until August 3rd, so it must be submitted at that time.

Mr. Darrah: May it be stipulated, Mr. Tweedt, that I may have that exhibit?

(Further discussion off the record.)

[Endorsed]: Filed Aug. 11, 1943. [183]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER THAT DECREE ENTER IN FAVOR
OF RESPONDENTS AND THAT THE
LIBEL, AS AMENDED, BE DISMISSED,
EACH PARTY TO PAY OWN COSTS;
ETC.

The above-entitled cause having been heretofore heard and submitted, it is now by the Court ordered that there be entered herein a Decree in favor of respondents and against libelant, and that the libel herein, as amended, be dismissed, upon findings of fact and conclusions of law. The respective parties will pay their own costs. [184]

[Title of District Court and Cause.]

ORDER DISMISSING AMENDED LIBEL.

The above entitled cause having been heretofore heard and submitted, it is now by the Court Ordered that there be entered herein a decree in favor of respondents and against libelant, and that the libel herein, as amended, be dismissed, upon findings of fact and conclusions of law. The respective parties will pay their own costs.

Dated: August 11, 1943.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Aug. 11, 1943. [185]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 22nd and 23rd days of July, 1943, before the above entitled court sitting in admiralty, the Honorable Michael J. Roche, United States District Judge, presiding. Messrs. Darrah & Ellis and Messrs. Single, Bryant, Cook & Herrington, by Guard C. Darrah, Esq., and Agler B. Ellis, Esq., appeared as proctors for Libelant, and Messrs. Derby, Sharp, Quinby & Tweedt by James A. Quinby, Esq., and Lloyd M. Tweedt, Esq., appeared as proctors for Respondents. Evidence, both oral

and documentary, [186] having been introduced and the cause submitted for decision, the Court now, after due deliberation thereon and consideration of the briefs and arguments of proctors, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

Libelant is a corporation duly organized and acting under the laws of the State of California. Libelant was at all times herein mentioned the owner of and in possession of the derrick barge "Foy No. 2".

II.

Respondents James R. Bundesen and Howard F. Lauritzen were at all times herein mentioned copartners doing business as general contractors under the firm name and style of Bundesen & Lauritzen.

III.

On the 14th day of May, 1941, Libelant and respondent Bundesen & Lauritzen made and entered into an oral agreement for the services of said derrick barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick barge "Foy No. 2" in connection with the construction of an outfall sewer by said respondent for the United States Navy on the Napa River near Vallejo, California. Libelant agreed to furnish the services of the said barge until the completion of said construction work provided respondent found

that the barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of \$10.00 per hour of actual use with a minimum charge for four hours on any day the barge was steamed up. [187] Libelant agreed to furnish and to include in the hourly charge of \$10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured. Respondent Bundesen & Lauritzen agreed to pay said hourly charge for the services of said barge for each hour of actual use with the minimum charge as aforesaid. Said respondent also agreed to pay the wages of the operator and fireman for any time, after said minimum of four hours, short of eight hours per day, as the operator and fireman had to be paid for a minimum of eight hours on any day they worked. Respondent also agreed to pay libelant for towing the said barge to and from the place of respondent's construction work.

IV.

On the 15th day of May, 1941, Libelant pursuant to said oral agreement as aforesaid, towed said derrick barge from Oakland, California, to the place of respondent's construction work on the Napa River; that thereupon Libelant informed respondent that libelant was unable to furnish its operator and fireman to operate said barge and requested respondent to secure another operator and fireman to

operate the barge for libelant and to deduct the wages of such operator and fireman from the hourly charge for the services of the barge. Respondent, pursuant to libelant's said request, did secure D. E. Williams and Adrian A. Westall to operate said barge as operator and fireman, respectively, for and on behalf of Libelant. Said D. E. Williams and Adrian A. Westall did operate said barge at said place on the 16th, 19th and 20th days of May, 1941, as operator and fireman for and on behalf of libelant. Respondent paid to said D. E. Williams and Adrian A. Westall the amount due to them [188] for their services as operator and fireman on said barge as aforesaid and thereafter deducted as agreed with libelant, the amount so paid to said Williams and Westall from the amount due from respondent to libelant for the services of said barge. Said barge was at all times herein mentioned in the possession of libelant and the operation, maintenance and care of said barge was at all said times under the exclusive control and management of libelant.

V.

On the 21st day of May, 1941, while said fireman Adrian A. Westall was engaged in the process of getting up steam on the boiler of said barge in the usual, customary manner in which said Westall had been directed and instructed by libelant, a fire occurred on said barge; that all damage suffered by said barge while at place of respondent's construction work was due to and caused by said fire; that subsequent to said fire libelant towed said barge

away from the place of respondent's construction work.

While Fireman Westall was engaged in getting up steam on the boiler of the barge as aforesaid, an explosion occurred in the firebox of said boiler which caused fire or burning oil to be thrown from the firebox onto the deck of the barge's fireroom; said fire spread rapidly forward on the barge, causing damage to various parts of the barge and its equipment; that the deck of the fireroom of said barge was covered and caked with oil. Said explosion was due to and caused by the failure of the equipment of the barge to function properly or by reason of defective fuel oil; the fuel line leading to the firebox on said barge was not equipped with a strainer; the damage to said barge was not caused by nor contributed to in whole or [189] in part, by any neglect or lack of care, or any improper act or failure to act, in any respect whatsoever on the part of fireman Westall, or on the part of respondents or any of them; fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish said fire; fireman Westall was at all times herein mentioned a competent, experienced fireman and was not guilty of any neglect or lack of proper care at any time in the performance of his duties as fireman on said barge; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

VI.

Shortly after the fire had occurred on said barge, libelant sent to respondents a bill dated May 21, 1941, for the services of the derrick barge on May 16, 19 and 20, 1941. Said bill contained a note stating: "This statement does not release your company from further liability or settlement in connection with loss due to fire." Respondents promptly returned said bill to libelant with a letter dated May 29, 1941, in which respondents asserted that they had no liability by reason of said fire. Libelant took no exception and made no reply to said letter, but libelant did thereupon under date of May 31, 1941, send a bill to respondents for the services of said barge, as aforesaid, and omitted from said bill any claim or reservation of right to claim damages from respondents for injury to said barge. Respondents thereupon paid said bill dated May 31, 1941, and libelant accepted payment thereof.

VII.

Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and [190] kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of \$12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of \$12,000.00.

VIII.

The premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

CONCLUSIONS OF LAW

And from the foregoing findings of fact, the Court makes the following conclusions of law:

I.

Libelant is not entitled to recover from respondents, or from any of them.

II.

The libel, as amended, should be dismissed, each party to bear its own costs.

III.

The oral contract between Libelant and Respondent Bundesen & Lauritzen was a contract for the services of the barge "Foy No. 2" and was not a demise of the barge.

IV.

Libelant, by agreeing with respondents to keep said barge fully insured and to include the cost of insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks.

Dated: Sept. 7th, 1943.

MICHAEL J. ROCHE

United States District Judge [191]

Approved as to form, as provided in Rule 22.

Proctors for Libelant

DERBY, SHARP QUINBY
& TWEEDT

Proctors for Respondents

Receipt of a copy of the foregoing proposed Findings of Fact and Conclusions of Law is admitted this 16th day of August, 1943.

SINGLE, BRYANT, COOK
& HERRINGTON

By FRED HERRINGTON
DARRAH & ELLIS

Proctors for Libelant

[Endorsed]: Lodged Aug. 17, 1943. Filed Sep. 7, 1943. [192]

In the Southern Division of the United States
District Court for the Northern District of
California

In Admiralty—No. 23686-R

STOCKTON SAND AND CRUSHED ROCK
COMPANY, INC., a corporation,

Libelant,

vs.

JOHN R. BUNDESEN, HOWARD F. LAURITZEN;
BUNDENSEN AND LAURITZEN,
et al.,

Respondents.

FINAL DECREE

The above-entitled cause came on regularly for trial on the 22nd and 23rd days of July, 1943, before the above-entitled Court sitting in admiralty, the Honorable Michael J. Roche, United States District Judge, presiding. Messrs. Darrah & Ellis and Messrs. Single, Bryant, Cook & Herrington, by Guard C. Darrah, Esq., and Agler B. Ellis, Esq., appeared as proctors for Libelant, and Messrs. Derby, Sharp, Quinby & Tweedt by James A. Quinby, Esq. and Lloyd M. Tweedt, Esq., appeared as proctors for Respondents. Evidence, both oral and documentary, having been introduced and the cause submitted for decision, [193] and the Court having made and filed herein its findings of fact and conclusions of law, Now, Therefore, it is

Ordered, Adjudged and Decreed that Libelant is not entitled to recover from respondents or from any of them, and it is further

Ordered, Adjudged and Decreed that the libel, as amended, be, and the same is hereby dismissed, each party to pay its own costs.

Dated: Sept. 7th, 1943.

MICHAEL J. ROCHE

United States District Judge

Approved as to form, as provided in Rule 22.

Proctors for Libelant

DERBY, SHARP, QUINBY
& TWEEDT

Proctors for Respondents

(Receipt of Service).

[Endorsed]: Lodged Aug. 17, 1943. Filed Sep. 7, 1943. [194]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 7th day of September, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

No. 23686-R

STOCKTON SAND AND CRUSHED ROCK CO.,
vs.

JOHN R. BUNDENSEN, et al.

FINAL DECREE ENTERED IN FAVOR
OF RESPONDENTS, ETC.

In accordance with the findings of fact and conclusions of law this day signed and filed, it is ordered that a final decree be entered in favor of the respondents, in the form this day signed and filed.

[195]

[Title of District Court and Cause.]

LIBELANT'S NOTICE OF APPEAL AND
PETITION FOR ALLOWANCE THEREOF

To the Honorable, the Judges of the United States
District Court for the Southern Division of the
Northern District of California:

The above named libelant, Stockton Sand and
Crushed Rock Company, Inc., feeling itself ag-
grieved by the final decree made and entered herein
on or about September 7, 1943, hereby appeals
therefrom to the United States Circuit Court of
Appeals for the Ninth Circuit.

Libelant respectfully prays that this appeal be
allowed and citation issued as provided by law, and
that a duly authenticated transcript of proceedings
herein be prepared and sent to said Circuit Court
of Appeals as required [196] and provided by law
and by the Rules of said Court.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Libelant

It is ordered that the appeal herein be allowed as
prayed for upon filing cost bond in the sum of
\$250.00 as required by law.

Dated: December 6th, 1943.

MICHAEL J. ROCHE
Judge of the United States District Court,
Northern District of California

[Endorsed]: Filed Dec. 6, 1943. [197]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The libelant hereby assigns errors in the proceedings, decrees, orders and decisions of the District Court in the above entitled action, as follows:

First: The District Court erred in failing to find that the actual possession, management and control of the Derrick Barge Foy No. 2 was in fact and with respondents at the time of the damage to the Barge on May 21, 1941.

Second: The District Court erred in failing to find that the oral agreement between libelant and respondents entered into on May 14, 1941, was and constituted a demise of the Barge Foy No. 2 from libelant to respondents. [198]

Third: The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Fourth: The District Court erred in failing to find that the fireman Ardian Westall was negligent in starting and operating the boiler on the Barge on May 21, 1941.

Fifth: The District Court erred in failing to find that the negligence of the fireman Adrian Westall resulted in the damage to the Barge.

Sixth: The District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

Seventh: The District Court erred in finding

(I) that the Derrick Barge Foy No. 2 was in the possession of libelant from May 15, 1941, to May 21, 1941, inclusive.

Eighth: The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelant agreed to furnish respondent the services of the Foy No. 2; that libelant agreed to furnish and include an operator, fireman and full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.

Ninth: The District Court erred in finding (IV) that after the Barge had been towed to the place of respondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D. E. Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the Barge [199] was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

Tenth: The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the

deck of the fireroom of the Barge was covered with oil; that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil; that the damage to the barge was not caused by nor contributed to in whole or in part by any neglect or lack of care, or any improper act or failure to act on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

Eleventh: The District Court erred in finding (VI) that after the fire libelant sent to respondents bills dated May 21, 1941, and May 31, 1941, respectively, for the services of the Barge.

Twelfth: The District Court erred in its conclusions of law, No. I, and each and every part thereof.

Thirteenth: The District Court erred in its conclusions of law, No. II, in concluding that the libel as amended should be dismissed.

Fourteenth: The District Court erred in its conclusions of law, No. III, in concluding that the oral contract between libelant and respondents was a contract for the services of, and was not a demise of, the Barge Foy No. 2. [200]

Fifteenth: The District Court erred in its con-

clusion of law, No. IV, in concluding that libelant agreed to keep the Barge fully insured, and to include the cost thereof in the hourly charge for services, and thereby assumed the risk of loss to the Barge by fire and other usual marine risks.

Sixteenth: The decision of the District Court is against law.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Appellant

[Endorsed]: Filed Dec. 6, 1943. [201]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Stockton Sand & Crushed Rock Company, Inc., a copartnership, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment rendered against said Stockton Sand & Crushed Rock Company, Inc., a copartnership in said action in the above entitled court and in favor of Respondents and entered herein on or about September 7th, 1943.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Glens Falls

Indemnity Company, a corporation organized and existing under the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Libelant, that said Libelant will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty Dollars (\$250.00), to which amount it acknowledges itself bound.

It is further stipulated on the part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court, may upon ten (10) days' notice to the Surety above named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of Two Hundred Fifty Dollars (\$250.00).

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, the 2nd day of December, 1943.

GLENS FALLS INDEMNITY
COMPANY

By DONALD J. MOLLBERG,
Attorney

[Seal]

The foregoing Bond is hereby approved this 6th day of December, 1943.

MICHAEL J. ROCHE

United States District Judge

(Acknowledgment of Surety)

[Endorsed]: Filed Dec. 6, 1943. [202]

[Title of District Court and Cause.]

LIBELANT'S PRAECIPE FOR
APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

Sir:

Please prepare Apostles on Appeal in the above entitled Admiralty case in accordance with provisions of law and the Rules of Court, and include therein the following:

1. All pleadings.
2. Transcript of all testimony offered or reviewed in evidence.
3. Deposition of Adrian A. Westall.
4. Libelant's Exhibits—
 1. Bill dated 6/30/41, \$637.77, Stockton Sand and Crushed Rock Co. to Bundensen & Lauritzen.
 2. Time card dated May 16, 1941.
 3. Time cards dated May 19, 20 and 21, 1941.
 4. Boiler Safety Order No. 850.
 5. Statement of Fireman Westall. [203]

5. Respondents' Exhibits—

A.

B.

C. (copy as of page 1, Reporter's Transcript)

D.

E.

6. Findings of Fact and Conclusions of Law.

7. Final Decree.

8. Notice of Appeal and Petition for Allowance Thereof, together with Allowance of Appeal.

9. Assignment of Errors, Citation on Appeal, Cost Bond, and this Praeipie.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON

Proctors for Libelant

Receipt of a copy of the foregoing Libelant's Praeipie for Apostles on Appeal is hereby acknowledged this 6th day of December, 1943.

DERBY, SHARP, QUINBY
AND TWEEDT

By (signed) FLOYD M. TWEEDT
Proctors for Respondents

[Endorsed]: Filed Dec. 6, 1943. [204]

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss.

To John R. Bundensen, Howard F. Lauritzen, and
Bundensen and Lauritzen, a Co-partnership:

Greetings:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Stockton Sand and Crushed Rock Company, Inc., a corporation, is appellant and you are appellees, to show cause, if any [205] there be, why the decree, order or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 6th day of December, 1943.

MICHAEL J. ROCHE

Judge of the United States District Court,
Northern District of California

Receipt of copy of the foregoing Citation is acknowledged this 6th day of December, 1943, to-

gether with copy of Notice of Appeal and Petition for Allowance thereof, Order thereon, Assignment of Errors.

DERBY, SHARP, QUINBY
AND TWEEDT

By LLOYD M. TWEEDT

Proctors for Appellee [206]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that all original Exhibits in the above entitled matter may be transmitted by the Clerk of the United States District Court to the Clerk of the Circuit Court of Appeals, Ninth Circuit, in original form.

Dated: December 11, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON

Proctors for Libelant

DERBY, SHARP, QUINBY
& TWEEDT

Proctors for Respondents

It is so ordered.

Dated: December 11th, 1943.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Dec. 11, 1943. [207]

[Title of District Court and Cause.]

RESPONDENTS' COUNTER-PRAECIPE
FOR APOSTLES ON APPEAL

To the Clerk of the above-entitled Court, to libelant
above named and to its proctors:

Respondents require that the Apostles on Appeal
be prepared in accordance with Admiralty Rule No.
5 contained in the Rules of the United States Cir-
cuit Court of Appeals for the Ninth Circuit.

Respondents require the inclusion in said Apostles
on Appeal of the following documents in addition
to the matters set forth in libelant's Praecipe for
Apostles on Appeal:

1. All exhibits offered by respondents and re-
ceived in evidence. Said exhibits may be trans-
mitted to the Clerk of the Circuit Court of Appeals
in and for the Ninth Circuit in original form as
heretofore stipulated.

2. All orders of the Court made herein.

3. Libelant's answer to interrogatories pro-
pounded by respondents.

4. Answers of respondents to interrogatories at-
tached to libel.

Respondents also demand and require the right to
examine the reporter's transcript of proceedings
herein and if any errors or omissions therein or
therefrom are claimed by respondents, the sub-

mission of said reporter's transcript to the Court for settlement.

Dated: December 15-1943.

DERBY, SHARP, QUINBY
& TWEEDT

Proctors for Respondents

(Receipt of Service)

[Endorsed]: Filed Dec. 16, 1943. [208]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellants may have to and including February 4, 1944, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 5, 1944.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Jan. 5, 1944. [209]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellants may have to and including February 18, 1944, to file the Record on Appeal in

the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: February 4, 1944.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Feb. 4, 1944. [210]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 210 pages, numbered from 1 to 210, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Stockton Sand and Crushed Rock Company, Inc., a corporation, Libelant, vs. John R. Bundensen; Howard F. Lauritzen; Bundensen and Lauritzen, x corporation; John Doe and Peter Poe, Respondents, No. 23686-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of Apostles on Appeal is the sum of \$34.40 and that the said amount has been paid me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San

Francisco, California, this 14th day of February,
A. D. 1944.

C. W. CALBREATH,
Clerk.

[Seal] M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 10687. United States Circuit Court of Appeals for the Ninth Circuit. Stockton Sand and Crushed Rock Company, Inc., Appellant, vs. John R. Bundensen, Howard F. Lauritzen and Bundensen and Lauritzen, a Co-partnership, Appellee. Apostles on Appeal Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 18, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.